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'Difference' and 'Similarity' in Comparative Law:
Lessons from Process-Relational Philosophy

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Abstract

Functionalism has been increasingly challenged by legal comparatists questioning its nature and suitability. These epistemologically-focused critiques have effectively dichotomised modern comparative law methods, leaving two undertheorised possibilities, namely, the functionalist model—understood in conventional positivist (and substance-ontic) lexes—and emergent postmodern approaches as typified by Pierre Legrand's system of 'negative comparative law' protocols. This article explores an often-neglected alternative grounded in process-relational philosophy. As shown by re-examining Ernst Rabel's original model, its central claim is that a synthesis of early functionalist theory and process-relational principles exposes postmodern critiques as imprecise and overstated—arguably misconceiving key notions of 'difference' and 'similarity', and consequently failing to appreciate how greater awareness of the correct order and relationships between levels of abstraction can enhance the nature and possibilities of comparative legal knowledge.

Keywords: *Comparative law; Functionalism; Legal theory; Process-relational philosophy*

Introduction

Comparative law appears to be stuck in an epistemic muddle. Whether one consults its primary detractors or its most stalwart proponents, a familiar refrain is emerging. After over a century of scholarly development,[1] including intensifying postmodern challenges to functionalism's epistemological

1. See e.g. Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3d ed translated by Tony Weir (Oxford University Press, 1998) ch 4. See also Arthur T von Mehren, "An Academic Tradition for Comparative Law?" (1971) 19:4 Am J Comp L 624; Ernst Rabel, "Aufgabe und Notwendigkeit der Rechtsvergleichung" in Hans Georg Leser, ed, *Ernst Rabel Gesammelte Aufsätze*, vol 3 (Mohr Siebeck, 1967) 1 [Rabel, *Collected Essays*]; Walther Hug, "The History of Comparative Law" (1932) 45:6 Harv L Rev 1027; Roscoe Pound, "The Revival of Comparative Law" (1930) 5:1 Tul L Rev 1.

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premises,[2] comparative law scholars of all stripes have sounded a clarion call for methodological and theoretical reform. This is a noteworthy development. After all, when a discipline's leading researchers jointly caution of epistemic "distortions" and "travesties,"[3] unjustified 'complexity reduction',[4] and a pressing need for a "radical rethink" of its fundamental principles,[5] something would seem to be seriously amiss.

One could easily be forgiven for failing to see much commonality among these accounts. Functionalism's staunchest critics, for example, have accused comparative law's dominant methodology of "epistemicide,"[6] arguing that the discipline is in effect "epistemologically doomed."[7] Due to functionalism's ostensibly "implausible epistemological assumptions," Pierre Legrand condemns it as "a vast equivalency-producing machine,"[8] a profoundly flawed method that scandalizes and represses difference,[9] "turns a blind eye to everything but surfaces,"[10] and distorts reality through acts of unreflexive observation.[11] Günther Frankenberg has likewise supplemented Legrand's vivid phraseology by reproving comparative law for lacking "a comprehensive system of analysis"[12]—a shortcoming necessitating wide-ranging methodological and theoretical adjustments.[13] Focusing more on the underserved zone of integrating theory and contextual analysis, William Twining has reproached comparative models for offering practitioners inadequate guidance "by way of synthesis, conceptual

2. See Pierre Legrand, *Comparative Law and the Task of Negative Critique* (Routledge, 2023) [Legrand, *Negative Critique*]; Pierre Legrand, *Negative Comparative Law: A Strong Programme for Weak Thought* (Cambridge University Press, 2022) [Legrand, *Negative Comparative Law*]; Pierre Legrand, "Negative Comparative Law and Its Theses" (2021) 16:2 J Comp L 647 at 648, 655, 674; Pierre Legrand, "What Is That, To Read Foreign Law?" (2019) 14:2 J Comp L 290 at 292ff; Pierre Legrand, "Foreign Law as Self-Fashioning" (2017) 12:2 J Comp L 6 at 40-41; Günther Frankenberg, *Comparative Law as Critique* (Edward Elgar, 2016) at 9, 54-59; Pierre Legrand, "Negative Comparative Law" (2015) 10:2 J Comp L 405 at 407, 410; Pierre Legrand, "Foreign Law: Understanding Understanding" (2011) 6:2 J Comp L 67 at 75 [Legrand, "Understanding Understanding"]; Pierre Legrand, "The same and the different" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 240 at 248-49; Pierre Legrand, "Comparative Legal Studies and Commitment to Theory", Book Review of *A Modern Approach to Comparative Law* by Peter de Cruz (1995) 58:2 Mod L Rev 262 at 263 [Legrand, "Commitment to Theory"]; Günther Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" (1985) 26:2 Harv Intl LJ 411 [Frankenberg, "Critical Comparisons"].
3. Legrand, "Negative Comparative Law", *supra* note 2 at 411.
4. See Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 52ff.
5. William Twining, "Globalisation and Comparative Law" in Esin Örücü & David Nelken, eds, *Comparative Law: A Handbook* (Hart, 2007) 69 at 83.
6. Legrand, "Negative Comparative Law and Its Theses", *supra* note 2 at 655.
7. Legrand, *Negative Comparative Law*, *supra* note 2 at 81.
8. Legrand, "Understanding Understanding", *supra* note 2 at 75, 94 [footnotes omitted].
9. *Ibid* at 93.
10. Legrand, "Commitment to Theory", *supra* note 2 at 263, quoting Lawrence M Friedman, "Some Thoughts on Comparative Legal Culture" in David S Clark, ed, *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker & Humblot, 1990) 49 at 52.
11. See Legrand, "Commitment to Theory", *supra* note 2 at 263.
12. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 58.
13. See *ibid* at 9.

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clarification, middle-order theorising, [and] critical evaluation of [its] ... presuppositions."[14] While he does not share their particular 'law as culture' view,[15] Legrand and Frankenberg seem to have found in Twining an unexpected ally owing to his ardent pleas for a 'radical reassessment' of functionalist thought.

At the core of these accounts is a well-known epistemological model that has been subject to sustained postmodern critique. Reproving mainstream legal comparatists for embracing "an obsolete view of science"[16] that obscures "*deficient theorization* regarding the production of scientific knowledge,"[17] a principal feature of Legrand's indictment is comparatists' presumed reluctance to re-examine functionalism's "pernicious epistemology."[18] Focusing on its "unexamined epistemological commitments to objectivity and truth,"[19] Legrand insists that to advance legal comparison, such commonplace notions "must be removed from the comparatist-at-law's epistemological tool-box."[20] In their place, he argues for a "new kind of thinking,"[21] one that will "emancipate" the discipline by employing a "more creditable epistemology" for studying foreign legal systems.[22] Besides repeated assurances that there is "no objectivity" and that "'[t]here never is any such thing as one truth,'"[23] we are advised that comparative law remains "woefully under-theorized"[24] and "harbours within itself the necessity of its own impotence."[25] Without inquiring further, this state of affairs seems exceedingly bleak.

But what, if anything, is wrong with legal 'functionalism' and its structural understanding of knowledge acquisition ('structural metaphysics')?[26] Despite well-intentioned proposals to employ a 'strong programme' of 'negative comparative law';[27] to "mobilize the differend ... [and] resolutely, *trace*";[28] and to

14. Twining, *supra* note 5 at 83.
15. See e.g. David Sugarman, "William Twining: the man who radicalised the middle ground" (2020) 16:4 Intl J L Context 475 at 477.
16. Legrand, "Understanding Understanding", *supra* note 2 at 104-05.
17. Legrand, *Negative Comparative Law*, *supra* note 2 at 385 [emphasis added].
18. Legrand, "Commitment to Theory", *supra* note 2 at 266.
19. Legrand, "Understanding Understanding", *supra* note 2 at 144.
20. *Ibid* at 155. See also Legrand, *Negative Critique*, *supra* note 2 at 240, 249.
21. Legrand, "Negative Comparative Law", *supra* note 2 at 407.
22. Legrand, "Understanding Understanding", *supra* note 2 at 144, 69.
23. *Ibid* at 165, 76, quoting Harold Pinter, "Art, Truth & Politics" (2006) 121:3 Publication Modern Language Assoc 811 at 811.
24. Legrand, *Negative Comparative Law*, *supra* note 2 at 269 [footnote omitted].
25. Legrand, "Understanding Understanding", *supra* note 2 at 84.
26. The term 'structural metaphysics' is ascribable to the process-relational theorist Alfred Korzybski, who used it to appeal in a *neutral* manner to the metaphysical assumptions underlying our primitive and scientific language structures alike, whether referencing the dominant Aristotelian substance-ontological paradigm, or more modern processual accounts developed in the twentieth century. See e.g. Korzybski, *infra* note 124 at 44; Korzybski, *infra* note 128 at 65. As detailed below, the term is not meant to implicitly support structuralist or substance-ontic accounts, but to acknowledge the two dominant and competing paradigms (i.e., substance-ontic versus processual) purporting to explain the 'structures of our metaphysics'. The argument as developed throughout this paper is, however, unabashedly *processual* in both its focus and application.
27. See generally Legrand, *Negative Comparative Law*, *supra* note 2.
28. Legrand, "Understanding Understanding", *supra* note 2 at 109 [emphasis in original]. See also Legrand, *Negative Comparative Law*, *supra* note 2 at 295ff.

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'rehabilitate facticity' through 'differencing', 'distancing', and 'thick description',[29] the specific epistemic details that might point our way forward appear to be missing. Are we necessarily left with this epistemological uncertainty and grim prognosis for legal comparison?

Taking up Legrand's mantle, this article argues against these postmodern misgivings by exploring an oft-neglected alternative based in process-relational philosophy. Its central claim is that an up-to-date, non-Aristotelian epistemology provides a vital "foundational frame for … critical comparativism,"[30] one that the discipline's founders and critics have implicitly sought all along. That is, a synthesis of functionalist theory and process-relational principles explains many misconceptions about comparative law's past and present methodological features and, by so doing, offers a clearer and more reliable account of its continued use and expected outcomes.

The argument proceeds in three parts. Part 1 outlines comparative law's epistemological quandaries by detailing leading postmodern critiques of functionalism and its alleged misuse. This precis of postmodern critiques lays bare some of the key—and more problematic—substance-ontic axioms implicit to their portrayal of the 'functionalist' method. In particular, these critiques oppose its supposed propensity for producing reified and overly reductionist accounts of foreign law, which blindly prioritises similarity over difference, product over process, and staticity over change. Besides preparing the ground for rejecting such outmoded notions in favour of more internally coherent *processual* accounts,[31] these epistemologically-focused analyses have also effectively dichotomised modern comparative law methods, leaving legal comparatists with two epistemically undertheorised options: namely, variations of the functionalist method—understood in conventional positivist (and substance-ontic) lexes; and emerging postmodern approaches—as epitomised by Pierre Legrand's system of 'negative comparative law' protocols.

Part 2 introduces process-relational philosophy's ontological 'Gestalt switch' and explores its importance and conceptual affinity with functionalism's earliest legal formulations. Inviting us to see the world in its full complexity, process-relational thought goes against the grain of Western philosophy and postmodern critiques alike by reconceptualising Aristotelian notions of substances, objects, and things as 'emergent structures' or 'stability waves' in a dynamic manifold of concatenated micro- and macroprocesses. After setting out its key tenets of flux, abstraction, and *multi*-ordinality using stronger (i.e., *ontologically* versus conceptually reductionist) Korzybskian and Whiteheadian processual models, the argument proceeds by exploring their resonance with early functionalist

29. For references to Legrand and Frankenberg's intellectual mandates, see Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 71-76; Legrand, *Negative Critique*, *supra* note 2 at 136-37 n 312, 168; Legrand, "Negative Comparative Law", *supra* note 2 at 411.

30. Legrand, "Commitment to Theory", *supra* note 2 at 263.

31. For a masterful analysis of the incoherence of substance-ontology and the need for adopting a process-relational paradigm, see Johanna Seibt, *Towards Process Ontology: A Critical Study in Substance-Ontological Premises* (PhD Dissertation, University of Pittsburgh, 1990).

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theory and Legrand's own nascent structural metaphysics. Parallels are drawn between process-relational emphases on interconnectedness and Ernst Rabel's ground-breaking but largely forgotten depictions of the multi-dimensionality of legal phenomena and his radical contextualisation of domestic and foreign law. Contrary to postmodern preoccupations with legal positivism, these similarities establish a strong case for recognising process-relational philosophy as legal functionalism's 'native' epistemology.

Finally, Part 3 demonstrates the theoretical relevance and power of process-relational thought by examining its importance for reconceptualising the functionalist method and setting it on a more suitable epistemological basis. To be exact, a synthesis of functionalist theory and process-relational principles exposes postmodern critiques as imprecise and overstated—misconceiving central notions of 'difference' and 'similarity', and consequently failing to distinguish the order and relationships between levels of abstraction and their implications for comparative legal knowledge. By confirming functionalism's viability and epistemological basis in *multi*-ordinal relationships, this process-relational reformulation of its structural metaphysics requires that we become not only 'difference engineers', as aptly endorsed by functionalism's postmodern critics, but, perhaps more importantly, that we aspire to become consummate '*similarity* engineers' as well.

At last, notwithstanding concerns that "[a] modern approach to comparison in law has yet to be written,"[32] process-relational thought not only supports the comparative law enterprise for inexorable epistemic and discursive reasons, but offers a more plausible and comprehensive structural metaphysics for attaining the "epistemological realism" and 'heightened awareness' long sought by legal comparatists on either side of this epistemological divide.[33]

1. Comparative Law's False Epistemological Dichotomy

1.A. The Functionalist Method: Postmodern (Mis)interpretations

We begin by examining how comparative law scholarship has characterised this emergent call for methodological reform. At its core, functionalism aims to enhance understanding of doctrinal and legal differences by positing shared socio-political objectives among suitable comparators.[34] As outlined by Konrad Zweigert and Hein Kötz,[35] functionalism's seldom-articulated five-step

32. Legrand, "Commitment to Theory", *supra* note 2 at 273 [emphasis omitted].
33. Legrand, *Negative Comparative Law*, *supra* note 2 at 285. See also *ibid* at 282, 382.
34. See generally Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law*, 2nd ed (Oxford University Press, 2019) 345.
35. See generally Zweigert & Kötz, *supra* note 1 at ch 3. See also Uwe Kischel, *Comparative Law*, translated by Andrew Hammel (Oxford University Press, 2019) at 88-90. According to a leading comparatist, Zweigert and Kötz's classic text "still sets the standard." Günter Frankenberg, "'*Rechtsvergleichung*'—A New Gold Standard?" (2016) 76 Heidelberg J Intl L 1001 at 1002.

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method employs an intricate analytical framework that places uncharacteristic pressure on a comparatist's ability to move fluidly and thoughtfully between multiple levels of abstraction, ranging from lower-order description to higher-order theorising and 'system-building'.[36] As arguably "the only comparative practice which has gained prominence as a method,"[37] functionalism's practicability has nevertheless been challenged by a broad assemblage of comparative law's foremost commentators who, whether proponent or detractor, increasingly question the nature and suitability of its structural metaphysics.

Twining, for example, argues that owing largely to the impact of increasing globalisation, functionalism is undergoing an epistemological crisis.[38] During an era where intensification of "trends, processes and interactions … [is] making the world more *interdependent*,"[39] functionalism has proven to be increasingly undertheorised, especially in the underserved zone of midlevel contextual abstractions. Despite influential formulations by Ernst Rabel and by Zweigert and Kötz,[40] Twining has advised that globalisation is "changing the significance of national and societal boundaries,"[41] necessitating a wider perspective and shifting to more integrative forms of observation and legal analysis, stating:

> A global perspective involves looking at the world and humankind *as a whole* and setting accounts of particular phenomena in the context of broad geographical pictures and long historical time-frames. Constructing 'total pictures' is an important aspect of contextual thinking. The world *is* becoming more interdependent and one needs to adopt a global perspective to understand these processes *in relation to law*.[42]

Emphasising that our current state-centric model has "not been replaced by any coherent theory,"[43] Twining has pressed for a 'radical' reassessment of comparative law theory and methods, observing:

> What is lacking is a coherent view of the enterprise and above all sustained discussion of shared issues of comparability, method, levels and objectives across a broader range of enquiries. One result of this is that those who do comparative work … do not get sufficient help and guidance from theory by way of synthesis, conceptual

36. Broadly conceived, Zweigert and Kötz's functionalist method involves the following five steps: (1) selection of comparators; (2) summarising of divergent legal approaches; (3) adopting a 'new perspective' with which to view differences; (4) 'system-building', requiring reformulation of differences in a new syntax; and (5) post-study evaluations. For a recent synopsis of functionalism, see Kischel, *supra* note 35 at 88-90.
37. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 56 [emphasis omitted].
38. See Twining, *supra* note 5 at 82-83. See also Oliver Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies" (2007) 32:2 Brook J Intl L 405 at 412-20; Frankenberg, "Critical Comparisons", *supra* note 2 at 416, questioning the 'objective reality' of cultural and legal objects.
39. Twining, *supra* note 5 at 69 [emphasis added].
40. See Ernst Rabel, *Rechtsvergleichung vor den Gemischten Schiedsgerichtshöfen* (Franz Vahlen, 1923); Zweigert & Kötz, *supra* note 1.
41. Twining, *supra* note 5 at 74-75.
42. *Ibid* at 72 [first and third emphases added, second emphasis in original].
43. *Ibid* at 82.

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> clarification, middle-order theorising, critical evaluation of assumptions and presuppositions and so on. . . . So the time is ripe for a quite *radical rethink*.[44]

Many others share Twining's concerns. Ralf Michaels, for example, has cautioned that "[t]he functional method has become both the mantra and the *bête noire* of comparative law."[45] First, Michaels observes correctly that, as a "theory, it hardly exists," prompting only 'rough guidance' from its founder Ernst Rabel and, in the ensuing 40 years, filling only a short chapter in Zweigert and Kötz's classic text.[46] Second, there is not one but several approaches to 'functionalism'. Michaels documents no less than eight, including classical functionalism, equivalence functionalism, instrumentalism, refined functionalism, adaptionism, epistemological functionalism, finalism, and constructivism.[47] Third, Michaels reports that despite this extensive list, many functionalist scholars "do not . . . follow *any* recognizable 'method'," [48] reinforcing the need for the very methodological guidance that Twining insists would not be expected from any up-to-date, fully-theorised model.

This need for reform is perhaps best underscored by functionalism's leading critics. While accepting functionalism as "[t]he basic methodological principle of *all* comparative law," [49] two of its sharpest and most (rightly) celebrated critics—Frankenberg and Legrand[50]—contend that its scholarly hegemony continues despite its alarmingly "underdeveloped methodological *basis*."[51] Inviting a thorough exploration and analysis of functionalism's epistemic foundations, Legrand captures the importance of meticulously probing and confirming its structural metaphysics by insisting that "[w]ithin the theory of comparative research into law, epistemology comes first, second, *and* third."[52] It would seem that coming to terms with functionalism's epistemic underpinnings can neither be long—nor profitably—avoided.

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44. *Ibid* at 82-83 [emphasis added].
45. Michaels, *supra* note 34 at 346.
46. *Ibid.* See also Zweigert & Kötz, *supra* note 1 at 32-47.
47. See Michaels, *supra* note 34 at 348-67.
48. *Ibid* at 347 [emphasis added].
49. Legrand, "Understanding Understanding", *supra* note 2 at 96, citing Zweigert & Kötz, *supra* note 1 at 34 [emphasis added].
50. See generally *supra* note 2. See also Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)" (1991) 39:1 Am J Comp L 1, whose 'legal formants theory' viewed legal systems as composed of conflicting legislative, judicial, and scholarly norms that oppose the traditional monolithic positivist view restricting legal norms to official sources. Though proposed as a dynamic comparative law alternative, Sacco's theory engaged at a much higher level of abstraction than Legrand and Frankenberg's more epistemically-focused critiques. See also Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986), who attempted to redesign the comparative law process to better detect *relationships* and to sharpen our awareness of differences and similarities not perceived through conventional methods. Despite his innovative approach, Damaška's conceptual model borrowed heavily from structuralist methods and sources (e.g., literary analysis) and, as with Sacco, endorsed his comparative model at a much higher level of abstraction than is the pedagogical focus of this paper.
51. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 55 n 87 [emphasis added].
52. Legrand, "Negative Comparative Law and Its Theses", *supra* note 2 at 655 [emphasis added].

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(i) Epistemic Distortions of 'Truth' and 'Objectivity'

A central pillar of Frankenberg and Legrand's epistemological critique is their postmodern assault on 'truth' and 'objectivity'. Importantly, these concerns—along with functionalism's alleged 'complexity reduction role'—implicate key (and internally incoherent) substance-ontological premises underlying the long-standing philosophical problems of individuality, similarity, and persistence over time.[53] Opposing any predilection for "definition and theories over practice," Legrand and Frankenberg's critique—awash in the Aristotelian substance-ontic language implicit to their 'positivist' readings of functionalism—nevertheless raises legitimate worries that comparative law knowledge might invalidly stem "from deduction from first principles and the recognition of *static* (or sufficiently stable), generalizable patterns that *abstract away* the inconstant aspects of the world we observe."[54] Concerns with descriptive failings and unwarranted classificatory stability abound for both theorists.

Addressing these very matters, Legrand contends that, insofar as functionalism is guided by conventional meanings of 'objectivity' and 'truth', it employs a "strategy of epistemic domination [that] *undermines* the very idea of knowledge."[55] According to this view, 'epistemic domination' purportedly stems from functionalists' proclivity for *unnecessarily* dissolving "the world into concepts and categories," discrediting and discounting "aspects … pertaining to discontinuity or unassignability."[56] In Frankenberg's terminology, 'function' is reified as a 'principle of reality', which "radicalizes de-contextualization by 'cutting loose' and 'stripping' the [doctrinal] solutions generated by the diverse legal regimes."[57] Owing to this 'excessive conceptualisation', the epistemic error would appear to consist in functionalists "*fak[ing]* a clarity that the factical intricacy of the world effectively precludes."[58] Simply put, by reducing legal practice to the "mere formulation of rules" and by engaging in 'unreflexive acts of observation', functionalist researchers thereby produce only "a *static*, reified and unreal view of a foreign legal system"[59] which, Legrand stresses, "can no longer be approached as a bounded, *stable*, fixed, form of knowledge (if it ever could)."[60]

Another key element of their epistemic critique is Legrand and Frankenberg's 'cultural theory' of law, which posits that—whatever their *substantive* content—an "interpreter's epistemological assumptions … are themselves historically and culturally conditioned."[61] Legrand consequently warns that owing to this contingency, "[o]bjectivity—in the sense of what is incontrovertible and non-controversial—is a

53. See Seibt, *supra* note 31 at 85ff, 174ff, 248ff.
54. William Penn, *Process Realism in Physics: How Experiment and History Necessitate a Process Ontology* (De Gruyter, 2023) at 6 [emphasis added].
55. Legrand, "Negative Comparative Law", *supra* note 2 at 409 [emphasis added].
56. *Ibid*.
57. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 54.
58. Legrand, "Negative Comparative Law", *supra* note 2 at 409 [emphasis added].
59. Legrand, "Commitment to Theory", *supra* note 2 at 265, 263 [emphasis added].
60. Legrand, "Understanding Understanding", *supra* note 2 at 70 [emphasis added].
61. Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4:2 MJECL 111 at 114.

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pernicious epistemology."[62] Besides misapprehending the 'factical intricacy' of the world, functionalism's epistemic hazards are compounded by failing to recognise that "[a]ll legal representations are immersed in a *cultural context*," which renders "[o]bjective comparison … *impossible*."[63] Addressing the futility of unfastening ourselves from our own juridical biases and pronouncements—as ostensibly sanctioned by Zweigert and Kötz—Legrand insists that such "'unfastening' … is neither possible nor desirable," and that 'objective' claims to conceptual neutrality "can only pertain to the realm of fiction."[64]

This multi-faceted postmodern critique also has major implications for our understanding of 'truth' which, similar to its conceptualisation of 'objectivity', "necessarily exists as [a] *cultural* construct."[65] As Legrand indicates in the following passage, 'objectivity' and 'truth' ultimately suffer the same indeterminate fate:

> All that a comparatist can hope to muster with respect to foreign law is an *interpretation* of it, and such an interpretation can only emerge out of a tripartite negotiation between a law-text, an interpreter and a reader—a situation entailing that every interpretation is defeasible, at least to the extent that a counter-argument can purport to resist or neutralize even an ingenious reading's disclosures.[66]

Comparative law is hence predominately "about *culture*, not truth."[67] Rather than fixate on "model[s] of veridiction"—as functionalists purportedly *must* do—Legrand proposes instead that the discipline's overriding ambition "must be to fashion *better epistemic equipment* in order to conduct more *meaningful research* into foreign law."[68]

In the end, Legrand concludes that notions of 'objectivity' and 'truth' foster only harmful cognitive habits that are tantamount to "[h]iding behind the fig-leaf of 'convenient fictions'"[69] and turning a blind eye to the reality "that *all* theories and *all* conceptual frames … are tenaciously *enculturated*."[70] Without identifying what this 'better epistemic equipment' necessarily looks like, prompt removal of such offending notions from a comparatist's 'epistemological tool-box' is nonetheless for Legrand an essential step towards "achieving more honest thinking about comparative law generally."[71]

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62. Legrand, "Commitment to Theory", *supra* note 2 at 266.
63. *Ibid* at 263, 266 [emphasis added].
64. Legrand, *Negative Comparative Law*, *supra* note 2 at 143 n 27.
65. Legrand, "Understanding Understanding", *supra* note 2 at 129 [emphasis added].
66. Legrand, "Negative Comparative Law", *supra* note 2 at 433 [emphasis added].
67. Legrand, *Negative Comparative Law*, *supra* note 2 at 291 [emphasis added]. See also Pierre Legrand, "Foreign Law, the Comparatist, and Culture: How It Is" in Cosmin Cercel, Alexandra Mercescu & Mirosław Michał Sadowski, eds, *Law, Culture and Identity in Central and Eastern Europe* (Routledge, 2023) 15.
68. Legrand, *Negative Comparative Law*, *supra* note 2 at 291 [emphasis added].
69. *Ibid* at 221, citing Michel-Rolph Trouillot, "North Atlantic Universals: Analytical Fictions, 1492-1945" (2002) 101:4 South Atlantic Q 839 at 839.
70. Legrand, *Negative Comparative Law*, *supra* note 2 at 221-22 [emphasis added].
71. *Ibid* at 24.

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(ii) Functionalism as a 'Vast Equivalency-Producing Machine'

Besides Frankenberg's early reproof of functionalism as "a vulgar version" of its sociological equivalent,[72] a second epistemological pillar that has galvanised postmodern critiques over the years has been a shared conviction that the functionalist method necessarily performs a mysterious but inexorable "complexity reduction" role.[73] In Legrand's persistently woolly lexicon, besides constituting an epistemic strategy "undermin[ing] the very idea of knowledge," functionalism's reductionism flows somehow from its propensity to "surrender to abstraction" which, by allegedly disregarding *all* difference, does "much violence to what there is."[74]

Despite its vague inferential leaps, Legrand's argument appears to run as follows. Impelled by "the epistemological impecuniosity of the '*praesumptio similitudinis*'"—together with frantic efforts to "gratify the comparatist's metaphysical urges [to control]"[75]—vital "discontinuities, diffractions, and dissonances" across legal cultures are *necessarily* overlooked or erroneously "'similarized' on account of their appropriation by the functionalist [method]."[76] Describing this predicament more plainly, Frankenberg observes that functionalist scholars are simply "not likely to either recognize or respect, let alone relish … *differences*."[77] The scholarly upshot is the cultivation of false impressions of 'universality' or "scientific reductionism across laws,"[78] accompanied by missed opportunities to replace these implicitly false-to-facts formulations with more accurate descriptions and analyses of foreign legal systems. Compared to functionalism's 'epistemic impoverishment', what is ultimately at stake for legal comparison, claims Legrand, is the prospect of achieving 'more sophisticated interpretations of foreignness' by realising "a considerably *enriched* interpretive yield."[79]

Looking to shed additional light on Legrand's striking but loose portrayal of functionalism as a 'vast equivalency-producing machine', Frankenberg arguably comes closest to revealing its 'inner epistemic workings', explaining:

> [R]ather than indulging in the social, political, economic and cultural *context* of law, the functionalist radicalizes *de-contextualization* by 'cutting loose' and 'stripping' the solutions generated by the diverse legal regimes and very often focuses on concepts. She reifies 'function' as a principle of reality and totalizes it as *the* container of reality, and does not take it for what it is: an *analytical device* introduced by

72. Frankenberg, "Critical Comparisons", *supra* note 2 at 434.
73. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 52.
74. Legrand, "Negative Comparative Law", *supra* note 2 at 409; Legrand, "Understanding Understanding", *supra* note 2 at 107.
75. Legrand, "Understanding Understanding", *supra* note 2 at 107, 144. See also Legrand, "Negative Comparative Law and Its Theses", *supra* note 2 at 655, where Legrand describes the '*praesumptio similitudinis*' as a "filtering mechanism[]" for differences.
76. Legrand, "Understanding Understanding", *supra* note 2 at 96.
77. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 57 [emphasis added].
78. Legrand, "Understanding Understanding", *supra* note 2 at 103.
79. Legrand, "Negative Comparative Law and Its Theses", *supra* note 2 at 647 [emphasis added].

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> comparative functionalism to order and construct the real world from, and within, a peculiar perspective and subject it then to cognitive control.[80]

But once again we find functionalism portrayed presumptively as fetishising 'concepts' with little regard to levels of abstraction or a more sophisticated epistemological analysis. As will be shown in Part 3, it is not particularly insightful to simply assert that functionalists detrimentally 'focus on concepts'—any act of comparison *must* eventually leave the realm of sensory experience and engage in abstract thought. The point is, rather, to determine at which specific level(s) of abstraction optimal 'solutions' are found, and how epistemic boundaries and changes in orientation influence comparative law analyses and results. Despite their resonance with established substance-ontic premises, neither Frankenberg nor Legrand's epistemic critiques adequately *specify* functionalism's 'complexity reduction' role or its part in 'undermining' legitimate claims to comparative legal knowledge.

1.B. Law-as-Culture: Postmodern Prescriptions for Epistemic Realism?

In the wake of their imperfect epistemic critiques, both Legrand and Frankenberg predictably aim to provide comparatists with more "defensible epistemic premises," along with effective remedies for functionalism's various "epistemic challenges."[81] Even so, despite their yearning for "better epistemic days"[82] and a more "sophisticated comparative law" realised by exposing "the *constraints* associated with knowledge-making,"[83] neither theorist ultimately succeeds in providing an alternative structural metaphysics or a convincing standalone epistemological model.[84] Importantly, as will be developed in Parts 2 and 3, their ill-defined but discernible association of functionalism with many of substance-ontology's most untenable premises remains undertheorised and in need of explication through modern process-relational accounts.

(i) Frankenberg's 'Differencing'/'Distancing' and 'Thick' Comparison

Frankenberg has responded to functionalism's 'de-contextualization' by endorsing the twin methods of 'distancing' and 'differencing'.[85] Prescribed to moderate functionalism's supposed 'complexity-reduction' effects, "[d]istancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance."[86]

80. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 54 [first, second, and fourth emphases added; third emphasis in original].
81. Legrand, "Negative Comparative Law", *supra* note 2 at 406, 407.
82. *Ibid* at 407.
83. Legrand, *Negative Comparative Law*, *supra* note 2 at 64, 63 [emphasis added].
84. See Brand, *supra* note 38 at 434.
85. See Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 70-76; Frankenberg, "Critical Comparisons", *supra* note 2 at 411-16.
86. Frankenberg, "Critical Comparisons", *supra* note 2 at 414.

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According to Frankenberg, "[d]istance de-centers our world-view and thus establishes what might be called objectivity."[87] 'Differencing', by contrast, involves comparatists accepting that "they do not view the phenomena they study from 'nowhere in particular'."[88] Rather, "comparatists operate and observe within the boundaries of a *particular* context and interpret what they see within a *particular* matrix provided by a specific cultural context that constitutes law and is also constituted by law."[89]

Importantly, distancing and differencing are not discretionary for Frankenberg, but "are prerequisites … of cultural translation."[90] To inoculate against functionalism's 'black box' of imposed uniformities, "*distancing*/*differencing* calls on the comparatist to decenter [their] worldview and to consciously establish subjectivity and context in the comparative space, that is, to take into account the *observer's* perspective."[91] Distancing and differencing are also intended to "foreclose any easy retreat to the land of virtuous study, where 'pure' science and methods reign and legal comparison can be believed to be unproblematic."[92]

Besides distancing and differencing, Frankenberg endorses the rough-and-ready concept of 'thick comparison'. While lacking a clear epistemological basis, 'thick' comparison nonetheless "is interested in restoring and rehabilitating law's *detail*, because it needs to bring law into view instead of making it disappear behind abstract categories and concepts."[93] Aiming to "move comparative work beyond its at times unbearable formalism, barrenness, and mechanistic style,"[94] Frankenberg contends—in a pithy statement capturing the *essence* of postmodern misreadings of functionalism—that "the comparative study of law cannot be a [simple] matter of *reducing* concrete differences to abstract commonalities."[95] Relying on this straightforward account of 'description' and 'theory', Frankenberg seeks "a richer conception of law," one that "is open to local knowledge and [is] context-sensitive."[96] As illustrated by his consistently ambiguous references to 'abstract categories and concepts'—rendered, in fact, without differentiating levels of abstraction or considering how epistemic boundaries and changes in orientation affect legal comparison or might even account for functionalism's rampant 'complexity reduction role'—Frankenberg's notion of 'thick comparison' ultimately falls short of conveying a precise account of its supporting structural metaphysics.

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87. *Ibid*.
88. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 72 [footnote omitted].
89. *Ibid* [emphasis in original].
90. *Ibid* at 75 [footnote omitted].
91. *Ibid* at 74 [first emphasis in original, second emphasis added].
92. *Ibid* at 76.
93. *Ibid* at 228 [emphasis added].
94. *Ibid* [footnote omitted].
95. *Ibid* at 229 [emphasis added], citing Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed (Basic Books, 2000) at 215.
96. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 227.

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(ii) Legrand's 'Negative Comparative Law'

Legrand's programme for epistemological reform can be best understood by comparing it to Frankenberg's earlier—and decidedly more *pragmatic*—prescriptions.[97] While Legrand has praised Frankenberg's plea for 'thick' comparison as being suitably 'context-sensitive' and committed to 'restoring and rehabilitating law's detail', he has recently distanced himself from Frankenberg's epistemic views, concluding that his "critical aspirations are ... insufficiently far-reaching, his oppositional edge not sharp enough to operate as comparative law's governing epistemological practice."[98] Legrand explains:

> Reading Frankenberg, one may be led to conclude that comparative law would ultimately *work*, if only it could escape the orthodoxy's stultifying epistemic chains by including some consideration of law's context, showing enhanced awareness of the comparatist-at-law's ethnocentric or juricentric bias, or embracing methodological pluralism. But not even Frankenberg's incisive indictment of orthodox cognitive assumptions addresses the underlying fact that comparative law is *epistemologically doomed*.[99]

So how then are the orthodoxy's 'stultifying epistemic chains' to be broken? Among the aspects of his ambitious intellectual agenda, Legrand's main prescription for functionalism's "unwarranted epistemological naïvete" is to "deploy[] an alternative paradigm" for studying foreign law, one that enables "(fully-fledged) interpretation" by avoiding the "serious and numerous deficiencies" of the functionalist method.[100] Legrand entreats:

> A *modern* approach to comparison in law has yet to be written. Within the European context in particular ... the elaboration of such an intellectual framework for comparative legal studies seems vital. Ultimately, the parameters within which cultural encounters develop in the lifeworld of the law will largely depend on the comparatist's *commitment to theory*.[101]

Underlining the vital importance of particularising one's structural metaphysics, Legrand's 'commitment to theory' is best revealed by examining his self-styled "strategy of epistemic governance."[102] As featured in his most recent scholarly publications, Legrand's developing system of 'negative comparative law'

97. See e.g. Fernanda G Nicola & Günter Frankenberg, *Comparative Law: Introduction to a Critical Practice* (Edward Elgar, 2024). Frankenberg's decidedly more practical bent is illustrated in this workbook, which integrates orthodox methods with critical approaches and provides a toolkit encouraging readers to actively generate, assemble, and compare legally-related phenomena in a spirit of *bricoleurship*.

98. Legrand, *Negative Comparative Law*, *supra* note 2 at 81.

99. *Ibid* [first emphasis in original, second emphasis added].

100. Legrand, "Understanding Understanding", *supra* note 2 at 75, 67, 83, 96.

101. Legrand, "Commitment to Theory", *supra* note 2 at 273 [first emphasis in original, second emphasis added].

102. Legrand, "Negative Comparative Law", *supra* note 2 at 405. See also Pierre Legrand, "Negative Comparative Law: The Sanitization Enterprise" (2023) 10:1 Revista de Investigações Constitucionais 1.

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purports to "credibilize research into foreign law and legitimize the fashioning of comparative legal studies"[103] by (crucially) *specifying* the "*cognitive constraints* within which [the comparatist] must approach the study of other laws."[104] Legrand's optimism for a successful 'epistemological overhaul' of functionalism appears unwavering. Yet despite seeking to upset comparative law's "dominant epistemological model,"[105] the more interpretive components of his scholarship quickly supersede any specific epistemological or structural insights.

Among his foremost intellectual influences (which include Martin Heidegger, Samuel Beckett, and Jacques Derrida), Legrand effectively builds his 'negative comparative law' system on key epistemological insights from Theodor Adorno's critical philosophy of negative dialectics, explaining that "[l]ike Adorno, I operate under the sign of the rigorous consciousness of *non-identity*: … non-identity across laws and non-identity across comparatists—and, of course, non-identity across laws *and* comparatists."[106] Legrand thus introduces his alternative comparative law system as an epistemological *antidote*—a way of 'saying no' to orthodox functionalism's epistemology—that repudiates a wide variety of established legal propositions.[107] Considering that his approach is not supported by any explicit structural metaphysics or epistemological modelling as conventionally understood, significant reliance is placed instead on a curious admixture of Derridean and Gadamerian theory.[108] Presuming an "*impassable gap* between self and other"[109]—which is analogised closely to the challenges of interpreting a foreign law text—Legrand concludes that "[u]nderstanding of an 'other' law simply *cannot* be had,"[110] an extension of dyadic interpersonal relations that has, incidentally, not gone unchallenged by behavioural scientists over the years.[111]

Looking to further deepen the analogy, Legrand claims that "[o]nly through (fully-fledged) interpretation can the foreign law-text escape the positive strait jacket and find itself being deployed meaningfully."[112] Starting from his major premise that "law exists *as* culture,"[113] Legrand insists that "the foreign law-text and the comparative legal mind operate according to *different* modes of existence, which … remain at an *unoverpassable* distance from one another."[114] Responding to this 'unbridgeable' epistemic gap, Legrand endorses the interpretive technique of 'tracing' which, by focusing the comparatist's attention on

103. Legrand, "Negative Comparative Law", *supra* note 2 at 405.
104. Legrand, "Understanding Understanding", *supra* note 2 at 67 [emphasis added].
105. *Ibid*.
106. Legrand, *Negative Comparative Law*, *supra* note 2 at 293-94. [emphasis added].
107. See Legrand, "Negative Comparative Law", *supra* note 2 at 454.
108. See Legrand, "What Is That, To Read Foreign Law?", *supra* note 2; Legrand, "Foreign Law As Self-Fashioning", *supra* note 2.
109. Legrand, "Negative Comparative Law", *supra* note 2 at 436 [emphasis added].
110. *Ibid* [emphasis in original].
111. See e.g. ZD Gurevitch, "The Power of Not Understanding: The Meeting of Conflicting Identities" (1989) 25:2 J Applied Behavioral Science 161.
112. Legrand, "Understanding Understanding", *supra* note 2 at 83.
113. *Ibid* at 109 [emphasis in original].
114. Legrand, "Negative Comparative Law", *supra* note 2 at 415 [emphasis added].

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chronicling differentiation and difference, "effectively consists in archaeological or genealogical work, [which] must produce an indisciplined assemblage of information to supplement" the foreign-law text.[115] While reluctant to endorse conventional legal 'methods',[116] tracing would appear to be a pivotal factor for fulfilling Legrand's primary objectives of acquiring better epistemic equipment and a richer interpretive yield for legal comparison.

Still, whatever its initial plausibility or appeal, it must be observed that by engaging in interpretive theory and 'self-other' dynamics—rather than precise epistemological modelling—it is difficult to see how Legrand's 'negative comparative law' system fulfils its grander promises of providing specific "transformative analytical equipment"[117] for optimising understanding of foreign legal cultures, or any "*new* kind of thinking."[118] Also, without an explicitly defined structural metaphysics, his comparative law critique devolves regularly into hyperbole. For instance, by denouncing functionalism's allegedly 'reifying' effects, Legrand is quick to identify a comparatist's unavoidable use of 'concepts and categories' with unwarranted reductionism and authoritarian control, cautioning:

> This surrender to abstraction is not nearly as innocuous as it may appear. Rather, such reduction reveals an *authoritarian urge* to *appropriate* and *frame the world* within preset formalist arrangements. As facticity is recast to assuage the administrative compulsion to capture the world by bringing it under control through an encasing of it into *concepts* and *categories*, this strategy of *epistemic domination* undermines the very idea of knowledge.[119]

Besides attributing to all functionalist scholars the same vague and uncharitable epistemic motivation, Legrand never *specifies* the nature and mechanism of this supposed 'epistemic domination', nor its 'damaging' effects on human knowledge acquisition. For a legal theorist who proclaims that epistemology is 'first, second, *and* third' in pedagogical importance, it must be said that the very structural metaphysics constituting our discipline's unique 'cognitive constraints'—which, as Legrand appropriately instructs, effectively *determines* our prospects for legitimate legal comparison and knowledge—remains rather thinly conceived by this 'state-of-the-art' postmodern critique. In its wake, we can be sure only that functionalism so conceived is somehow characterised by a propensity for producing reified and overly reductionist foreign law accounts.

These misapprehensions aside, Legrand and Frankenberg's critiques of functionalism *do* demonstrate that one's structural metaphysics—perhaps more than any other factor—determines our ability as legal comparatists to conduct and explain our work precisely and credibly. If nothing else, according to their

115. Legrand, *Negative Comparative Law*, *supra* note 2 at 390-91. See also Legrand, *Negative Critique*, *supra* note 2 at 164.
116. See Legrand, *Negative Comparative Law*, *supra* note 2 at 412.
117. Legrand, "Negative Comparative Law and Its Theses", *supra* note 2 at 647.
118. Legrand, "Negative Comparative Law", *supra* note 2 at 407 [emphasis added].
119. *Ibid* at 409 [emphasis added].

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postmodern forays, where 'truth' and 'law' are socially constructed and 'objectivity' cannot survive the vagaries of cultural experience, "[w]hat comparative legal studies *needs*, and does not get from [functionalism], is a foundational frame,"[120] or a clear statement of its structural metaphysics. This effectively leaves legal comparison with a stark dichotomy of undertheorised options, namely, the functionalist method—understood in conventional positivist (and substance-ontic) lexes—and emergent postmodern alternatives as typified by Legrand's 'negative comparative law' system.

However, as considered in Parts 2 and 3, when informed by process-relational thought, Legrand and Frankenberg's critiques are revealed as imprecise and overstated—particularly in their inability to distinguish the order and relationships between levels of abstraction and to track their implications for key comparative law concepts of 'difference' and 'similarity'. What is more, powerful synergies between process-relational principles and Ernst Rabel's original functionalist model provide a highly credible but overlooked alternative that arguably constituted functionalism's 'native' epistemology from the outset.

2. Process-Relational Origins of Functionalism

2.A. Process-Relational Philosophy: Functionalism's Native Epistemology

The twentieth century witnessed revolutionary advances in our understanding of the universe and in the acquisition of human knowledge. In contrast to 'substance metaphysics' (the dominant research paradigm in Western philosophy that depicts reality as an assembly of static objects and individuals), renowned process-relational philosophers such as Alfred North Whitehead argued that orthodox scientific models were established on significant fallacies, which advances in quantum mechanics and relativity theory had convincingly exposed.[121] Rather than mischaracterise 'reality' as internally undifferentiated and unchangeable, process-relational philosophers reject this substance-metaphysical 'snapshot' view by stressing the processual and interrelational aspects of nature, cognition, and action as *the* foundational features of our natural world.[122] That is to say, the

120. Legrand, "Commitment to Theory", *supra* note 2 at 263 [emphasis added].

121. See e.g. Alfred North Whitehead, *Process and Reality: Corrected Edition* ed by David Ray Griffin & Donald W Sherburne (Free Press, 1978) [Whitehead, *Process and Reality*]; Alfred North Whitehead, *Science and the Modern World* (Free Press, 1967); Alfred North Whitehead, *The Concept of Nature*: *The Tarner Lectures Delivered in Trinity College November 1919* (Cambridge University Press, 1971) [Whitehead, *The Concept of Nature*].

122. See William Penn, "Pure Process Realism: The Unification of Realism and Empiricism" (2024) 47:1 Manuscrito 1 [Penn, "Pure Process Realism"]; Penn, *supra* note 54; Randall E Auxier & Gary L Herstein, *The Quantum of Explanation: Whitehead's Radical Empiricism* (Routledge, 2017); C Robert Mesle, *Process-Relational Philosophy: An Introduction to Alfred North Whitehead* (Templeton Foundation Press, 2008) chs 3, 5, 6; Nicholas Rescher, *Process Philosophy: A Survey of Basic Issues* (University of Pittsburgh Press, 2000); Nicholas Rescher, *Process Metaphysics: An Introduction to Process Philosophy* (SUNY Press, 1996) [Rescher, *Process Metaphysics*]. For a recent legal reference to

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only satisfactory way to understand what things 'are' is to assess what they *do*. Not reducible to the work or influence of any single individual or school of thought, process-relational philosophy can perhaps be best seen as a wide-ranging movement dedicated to improving our descriptions and explanations of reality based on a generalised approach that ultimately sees "substantial things as *subordinate* to processes both ontologically … and conceptually."[123]

A lesser known but significant process-relational publication was Alfred Korzybski's *Science and Sanity*.[124] Influenced by these same advances in theoretical physics, Korzybski's system of 'general semantics' promised profound insights into the misuse of human language and conventional epistemological models. These advances included significant revisions to our understanding of 'truth', 'causation', and the connection between our theories and 'what is going on'. Korzybski's system appealed to prominent legal realists such as Karl Llewellyn and Dean Roscoe Pound of Harvard Law School;[125] however, despite its brief efflorescence in France and the United States, by the 1960s his 'general semantics' movement had for all practical purposes ceased to exist. Yet together with Whitehead's innovative process-relational scholarship, its rediscovery promises even more as an intellectual salve to today's postmodern confusion.

Part 2 introduces process-relational philosophy's ontological 'Gestalt switch', and explores its importance and conceptual affinity with functionalism's earliest legal formulations. Using stronger (i.e., *ontologically* reductionist) Korzybskian and Whiteheadian processual models,[126] this section surveys process-relational philosophy's three fundamental tenets: (i) the ubiquity of change and interconnectedness at non-verbal levels of abstraction; (ii) the inexorable knowledge constraints associated with its theory of 'abstraction'; and (iii) its rejection of correspondence and postmodern theories of 'truth' in favour of *similarity-of-structure* and mapping *multi*-ordinal relationships. This section also studies the epistemological overlaps and disjunctions with Legrand's own system of 'negative comparative law', and demonstrates how process-relational principles

process-relational philosophy, see Randall Stephenson, "A Truth-Seeking Justification for Press Freedom?" (2019) 39:3 Oxford J Leg Stud 681 at 686-90.

123. Rescher, *Process Metaphysics*, *supra* note 122 at 33 [emphasis added].

124. See Alfred Korzybski, *Science and Sanity: An Introduction to Non-Aristotelian Systems and General Semantics*, 5th ed (Institute of General Semantics, 1994).

125. Roscoe Pound was an original 'honorary trustee' of the Institute of General Semantics, which was incorporated in Chicago in 1938. See e.g. Cecil C Kent, "General Semantics and the Patent System" (1945) 27:1 J Pat Off Soc'y 37 at 37. Regarding Llewellyn, William Twining recalled personal conversations with him about Korzybski, confirming that "Llewellyn owned a copy of Alfred Korzybski's *Science and Sanity*." William Twining, *Karl Llewellyn and the Realist Movement*, 2nd ed (Cambridge University Press, 2012) at 404 n 36.

126. The distinction between 'stronger' and 'weaker' versions of process-relational philosophy comes from Rescher, who distinguished between theorists (e.g., Korzybski and Whitehead) whose *ontological* reductionism sees all 'things' as reducible to physical *processes*, and a weaker version of *conceptual* reductionism that sees explanations of 'things' as necessarily involving recourse to processual ideas. See Rescher, *Process Metaphysics*, *supra* note 122 at 28. Interestingly, Seibt also saw Whitehead's ontological scheme as coming closest to entailing a total rejection of substance-ontology. See Seibt, *supra* note 31 at 431. See also Penn, *supra* note 54, who makes a similar case for his 'strong' theory of 'pure process realism'.

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both inform and 'update' Ernst Rabel's original functionalist model. Despite being overlooked by comparative law scholars, these parallels establish a strong case for recognising process-relational thought as functionalism's genuine 'native' epistemology.

(i) Perpetual Change: Flux vs 'Things'

The first and most fundamental facet of process-relational philosophy is its acknowledgment of the universality of change at non-verbal levels of abstraction. Although originating in ancient Greece,[127] modern process-relational thought began with what twentieth-century science had to say about the scientific 'object'. Considering a deceptively 'straightforward' item like an elementary school pencil, Polish mathematician and engineer Alfred Korzybski reported:

> [W]e find that the 'scientific object' represents an 'event', a mad dance of 'electrons', which is *different every instant*, which *never repeats itself*, which is known to consist of extremely complex dynamic processes of very fine structure, acted upon by, and reacting upon, the rest of the universe, inextricably connected with everything else.[128]

So ubiquitous is this 'mad dance' of electrons that not only can one not step into the same river twice but, as the pre-Socratic Greek philosopher Cratylus observed, "you can't even step into the same river *once*."[129] Since no process is ever complete, and events have infinite characteristics, it is impossible to obtain "a 'complete' acquaintance with even so simple an object as a pencil"[130]—a point in line with Legrand's comparable account of everyday objects that "it is impossible … to see the whole" of their actuality or existence.[131]

Unlike correspondence theorists (who effectively infuse their 'scientific' formulations with unjustified elementalism and staticity) and postmodernists (who conceive of an unreproducible reality), process-relational philosophers identify a complex structure *connecting* the 'scientific object' with its constituting forces. Korzybski relates:

> (1) Macroscopically, we have a structure in levels, stratified, so to say, with complexities arising from the general colloidal physico-chemical structure of the organism-as-a-whole. (2) The general sub-microscopic, atomic, and sub-atomic structure of all materials simply gives us the persistence of the macroscopic characteristics as

127. See Rescher, *Process Metaphysics*, *supra* note 122 at 9-10.
128. Alfred Korzybski, *Selections from Science and Sanity: An Introduction to Non-Aristotelian Systems and General Semantics* (Institute of General Semantics, 1948) at 180 [emphasis added].
129. Mesle, *supra* note 122 at 8 [emphasis added]. Though linked to a metaphysical tradition dating back to ancient Greece, leading processists have stressed that process-relational philosophy "is not of the past and does not belong to it." Rescher, *Process Metaphysics*, *supra* note 122 at 4. Based on the then new quantum and relativity theories, its "provocative and fertile philosophical approach" (*ibid* at ix) is essentially "a creation of the twentieth century" (*ibid* at 1).
130. Korzybski, *supra* note 128 at 170.
131. Legrand, *Negative Comparative Law*, *supra* note 2 at 179.

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> the relative *invariance of function*, due to dynamic equilibrium, and ultimately reflected and conditioned by this *sub-microscopic structure* of all materials.[132]

Whitehead similarly explained:

> In the inescapable flux, there is *something* that *abides*; in the overwhelming permanence, there is an *element* that *escapes into flux*. Permanence can be snatched only out of flux; and the passing moment can find its adequate intensity only by its submission to permanence. Those who would disjoin the two elements can find no interpretation of patent facts.[133]

According to process-relational principles, therefore, we never experience 'things' but, rather, only fragments of passing *events*. As unsettling as it might appear for humanity, we experience during our short lifetimes only a seemingly random and minute portion of infinite processes of change: 'thing-*ing*'.[134]

For the comparatist-at-law, then, our baseline capability to understand the very 'objects' of our comparisons is subject to two inviolable epistemological constraints. First, owing to perpetual change, one can never represent definitively what any scientific object 'is'. Second, due to nature's boundless interconnectivity, we can never know everything there is to know about 'it'. While appearing more or less consistent with Legrand's commitment to 'negation' and his Leibnizian view that "two individual things … must *always* differ,"[135] process-relational philosophy's governing 'epistemic constraints' are more thoroughly specified and do not ultimately require Legrand's denunciation of the functionalist method, nor his outward denial of its possibilities for comparative law knowledge.

(ii) Abstraction: An Epistemic Obstacle to 'Objective' Knowledge

These epistemological constraints are further compounded by the second (and related) precept of process-relational philosophy—its theory of *abstraction*. Stated simply, 'abstraction' means that human beings process information by *leaving particulars out.*[136] Since our realities are necessarily partial, we obtain incomplete information about the world. Essentially, we acquire knowledge through inefficient biological processes.[137] Compared to Frankenberg and Legrand's 'epistemic constraints'—which are either inexplicit or highly dependent on imperfect analogies to 'self-other' dynamics—what distinguishes Korzybski's theory of abstraction is that, rooted in *human physiology* and connected only partially to the natural world, its resultant inefficiencies are inevitable, inescapable, and *necessary.*[138]

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132. Korzybski, *supra* note 124 at 162 [emphasis in original].
133. Whitehead, *Process and Reality*, *supra* note 121 at 338 [emphasis added].
134. See Penn, *supra* note 54 at 6-8.
135. Legrand, *Negative Comparative Law*, *supra* note 2 at 230 [emphasis added].
136. See Korzybski, *supra* note 128 at 41.
137. See *ibid* at 166-79.
138. See Korzybski, *supra* note 124 at 166.

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Consider Korzybski's 'Structural Differential of Reality'.[139] As illustrated in Figure 1,[140] the Structural Differential is a 'map of the map-making process' depicting three levels of 'reality' organised circularly from top to bottom: The Event Level (open parabola); the Object Level (circle under parabola); and the Label Levels (rectilinear pieces). Although different, all levels are equally *real*.

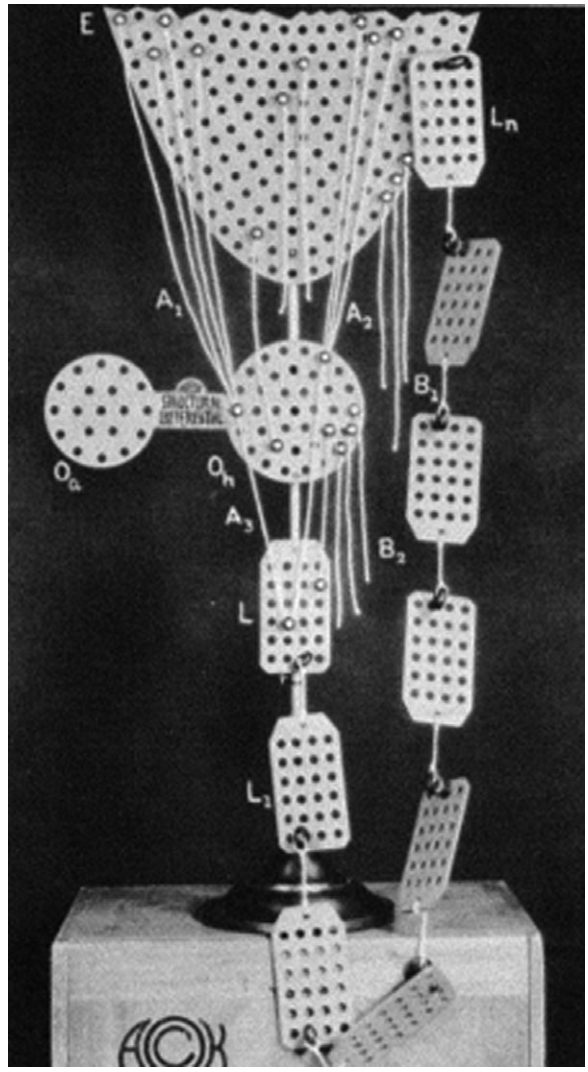
The Event or Process Level is that of the unreachable 'event', or the 'scientific object', or unseen physico-chemical processes that constitute *stimuli* registered as 'objects' by our nervous systems.[141] Due to the circularity of human knowledge,[142] the Event Level is both the 'lowest' and 'highest' level of abstraction. Revealed as an unending realm of infinite difference, it includes our best knowledge about the natural world—one of endless change, interconnectedness, and multi-dimensional order and relations, formulations in line with other 'strong' processual accounts describing material objects as "stability waves in a sea of process," and the natural world itself as "a manifold of concatenated processes" or "one vast, all-encompassing megaprocess."[143] Importantly, these sub-atomic events redefine 'substance' as *relational*, with sweeping implications for knowledge acquisition. All is relational. Everything is the result of all of its causes. As Whitehead observed, "[t]he demarcation of events, the splitting of nature up into parts is effected by the objects which we recognise as their ingredients. The discrimination of nature is the *recognition* of *objects* amid passing events."[144] In step with the Kantian notion of *Ding an sich* ("thing in itself"),[145] while we *can* recognise 'objects'—and through experimental activity and 'extra-neural' means (e.g., electron microscopy) access *processes*—it is essential to understand that we have no *direct* access to the Event Level.[146]

The second level of reality is the Object Level, which parallels our realm of 'appearances' and sensory experience, where we see, hear, smell, taste, and touch.[147] Korzybski labels these non-verbal experiences 'lower-order abstractions', which involve "a nervous abstraction of a low order" involving—as does any change between the three levels of reality—radical transformations in *quality*.[148] Specifically, a transduction of energy occurs at the organism-environment interface whereby our 'senses' are only a result that mirrors *interaction* between

139. See generally Korzybski, *supra* note 128 at 180-200.
140. *Ibid* at 191 [photograph reproduced with permission of the Institute of General Semantics].
141. See Korzybski, *supra* note 124 at 20.
142. See *ibid* at 220.
143. Rescher, *Process Metaphysics*, *supra* note 122 at 53, 90, 94. See also Korzybski, *supra* note 124 at 161-70; Penn, *supra* note 54, whose theory of 'pure process realism' posits only *processes* from God to stone (so to speak).
144. Whitehead, *The Concept of Nature*, *supra* note 121 at 144 [emphasis added].
145. Immanuel Kant, *Critique of Pure Reason*, edited & translated by Paul Guyer & Allen W Wood (Cambridge University Press, 1998) at 350.
146. See Gregory Bateson, "Form, Substance and Difference" (2015) 72:1 ETC: Rev General Semantics 90 at 96.
147. See generally Carl G Hempel, *Philosophy of Natural Science* (Prentice-Hall, 1966) ch 2.
148. Korzybski, *supra* note 128 at 201.

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Figure 1. Korzybski’s Structural Differential of Reality



‘it’ and our nervous system.[149] Our non-verbal ‘perceptions’, therefore, are not to be mistaken for simple ‘direct copies’ of Event-Level phenomena.

Our sense of vision provides an instructive example. Unable to simply ‘record reality’, our eye absorbs a limited amount of energies of ‘reality’ and translates

149. Robert Pula explains this transduction thus: “Light … traveling at speeds slightly faster than 186,000 miles per *second* (in a ‘vacuum’) cannot be tracked on a one-to-one basis by an electro-chemical … nervous system whose maximum transmission speeds have been clocked at about 225 miles per *hour*.” Robert P Pula, “A General Semantics Glossary (Part III)” (1992-93) 49:4 ETC: Rev General Semantics 470 at 471 [emphasis in original].

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that sample, following which our brain interprets this preliminary transformation. As explained by neuropsychologist Richard Gregory, "[t]he retina is not merely a layer of light-sensitive cells, it is also a 'satellite computer' in which visual information is pre-processed for the brain."[150] Furthermore, what we ultimately 'see' is based on interpretations of light patterns that were perceived a moment ago. In the end, whatever we sense of 'reality' in terms of textures, colours, sounds, images, temperatures, etc., is only our nervous systems' *interpretation* of a very limited sample of 'energies' soon past.

The Object Level is also a silent realm without meaning. Korzybski defined an 'object' as "a 'first abstraction' (with a finite number of characteristics) from the infinite numbers of [*multi*-ordinal] characteristics an event has."[151] That is, "[w]hat we see is structurally only a specific *statistical mass-effect* of happenings on a much finer grained level. We *see* what we see because we *miss* all the finer details."[152] As Legrand himself seems to have understood by insisting that legal comparativists reach for ever 'higher interpretive yields',[153] this opening stage of abstraction has significant implications for human knowledge acquisition. Namely, optimising the 'truth' of our verbal formulations requires exploring objects "from all possible points of view and put[ting] [them] in contact with as many nerve centres as we can,"[154] a point of notable significance for assessing functionalism's epistemic nature. These "different, partial, abstracted, specific pictures" must then be "summarized" to become the basis for descriptions and theorising.[155] Legrand's reverence for the 'differend'—along with his admiration of Samuel Beckett's commitment to "never put his work ahead of his *experience*"[156]—resonate as well with these process-relational directives to ground our descriptions, theories, and, as we shall see—*comparisons*—on as rich an 'experiential yield' as possible.

The third and final levels are the Label Levels, wherein we attach 'labels' to objects and ascribe to them certain characteristics. These 'higher-order' abstractions are more commonly known as 'description' and 'theorising'. Involving ever-increasing *losses* of information, "[t]he label, the *importance* of which lies in its *meanings to us*, represents a *still higher* abstraction from the event."[157]

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150. RL Gregory, *The Intelligent Eye* (McGraw-Hill, 1970) at 24. For a more recent study on the history, philosophy, and science of vision and colour, see M Chirimuuta, *Outside Color: Perceptual Science and the Puzzle of Color in Philosophy* (MIT Press, 2015). Chirimuuta's theory of 'color adverbialism' also conceives of visual capacities (and perceptual states more generally) as processual *interactions* between a perceiver and the environment.

151. Korzybski, *supra* note 128 at 182.

152. *Ibid* at 171 [emphasis in original].

153. See Legrand, *Negative Critique*, *supra* note 2 at 1, 124, 257.

154. Korzybski, *supra* note 128 at 171.

155. *Ibid*.

156. Legrand, *Negative Comparative Law*, *supra* note 2 at 35 [emphasis added]. Describing his intellectual debt to Beckett, Legrand has acknowledged that "I now consider my publications an isomorphic re-presentation—a representation anew—of Beckett's leading claims." Pierre Legrand, "Beckett's Weather Report" in Luca Siliquini-Cinelli, Davide Gianti & Mauro Balestrieri, eds, *The Grand Strategy of Comparative Law: Themes, Methods, Developments* (Routledge, 2024) 181 at 181.

157. Korzybski, *supra* note 128 at 182 [first and second emphases in original, third emphasis added].

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More precisely, "the object *is not* the event but an abstraction from it, and ... the label *is not* the object nor the event, but a *still further* abstraction."[158] Like abstracting from the Event Level to sensory experience, labels also *leave out* particulars, especially when abstracting at higher orders. This theoretically limitless process concludes only when the highest Label Level reflects our most advanced scientific knowledge, or "'as if' formulations" (i.e., 'best-guess' maps).[159] Feeding back circularly into the Event Level (see Figure 1), "science" therefore becomes an "extra-neural" extension of our nervous system.[160]

At last, notwithstanding similarities to Legrand's own 'negative metaphysical' approach, Korzybski's Structural Differential distinctly charges legal comparatists with the unavoidable and vitally important task of constructing 'similarity' by identifying and formulating *multi*-ordinal relations[161]—which, as confirmed in Part 3, represents a radical point of departure from Legrand's less-rigorously-developed epistemological framework.

(iii) Multi-Ordinal Relations: Similarity-of-Structure vs Correspondence

A third distinctive feature of 'stronger' (i.e., Korzybskian/Whiteheadian) versions of process-relational philosophy concerns the nature of the *link* between our verbal formulations and the natural world. Modern science reveals that no human language is at all similar to the structure of the energies outside ourselves.[162] Even when our powers of perception are enhanced through 'extra-neural' means, we encounter distinct quantitative and qualitative epistemic limitations. As Korzybski put it, "*structurally* we are immersed in a world full of energy manifestations, out of which we abstract directly only a very small portion, these abstractions being already coloured by the specific functioning and structure of the nervous system."[163]

These structural limitations also involve our 'higher-order' abstractions, a crucial point for establishing comparative law's 'better epistemic equipment'. Since the human nervous system (even when aided by scientific instruments) is our inescapable, limited frame of reference for experiencing the world, we have no option but to use our transacting nervous systems to construct knowledge claims at progressively higher levels of abstraction, extending from 'lower-order' description to our 'highest-level' inferences or 'best-guess' maps of how the universe functions. Conspicuously, each level of abstraction represents a *different* level of knowing that is neither 'objective' nor 'complete'. No description can cover all the facts. And no map can represent all the details of the territory. In

158. *Ibid* [first and second emphases in original, third emphasis added].
159. Gregory Sawin, "The Structural Differential Diagram—Part II" (2003-04) 60:1 ETC: Rev General Semantics 59 at 66-67.
160. Korzybski, *supra* note 128 at 188.
161. See Korzybski, *supra* note 124 at 59.
162. See Francis P Chisholm, *Introductory Lectures on General Semantics: A Transcription of a Course Given at the Institute of General Semantics* (Institute of General Semantics, 1980) at 14-15.
163. Korzybski, *supra* note 124 at 238 [emphasis added].

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this respect, both Frankenberg and Legrand's rejection of 'objectivity' and 'truth' would appear to be grounded on sound process-relational insights.

Still, any ostensive overlap with postmodern critiques does not necessitate outright denial of the functionalist method. While we cannot say everything there is to know about anything, let alone state definitively what anything 'is',[164] our distinctly human capacity to abstract in increasingly higher orders allows us a 'way out' of this apparent epistemic bind by producing symbolic formulations *similar-in-structure* to 'what is going on'. As Korzybski explained, similarity-of-structure is the goal of *all* higher-order abstracting under his model of process-relational thought, including (and especially) the scientific method itself:

> If words *are not* things, or maps *are not* the actual territory, then, obviously, the only possible link between the objective world and the linguistic world is found in *structure, and structure alone*. . . . If the structures *are similar*, then the empirical world becomes 'rational' to a potentially rational being, which means no more than that verbal, or map-predicted characteristics, which follow up the linguistic or map-structure, are applicable to the empirical world.[165]

As distinct from correspondence theorists, who improperly *identify* their verbal formulations with what they purport to represent—falsely attributing to them a timeless, changeless reality—process-relational theorists maintain that "the whole content of knowledge is exclusively *structural*,"[166] precisely owing to the powerful, biologically-based epistemic limitations rooted in our capacities for abstraction. For a functionalist legal scholar as much as anyone else, the chief process-relational implication for human knowledge acquisition is clear: "If we want to be rational and to understand anything at all, we must look for structure, relations, and, ultimately, *multi*-dimensional order."[167]

With these three defining principles in hand, we are now better-positioned to understand early functionalist theory by reconstructing its 'inner epistemic workings' and evaluating their implications for legal comparison. Rather than 'unlearn' functionalism—as Legrand urges comparatists to do to advance our grasp of foreign law—achieving this nonetheless worthwhile aim requires, perhaps, only that it be '*re*-learned'.[168]

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164. See e.g. Mark Cohen, "To Be or Not to Be" (2017) 46:1 Colo Lawyer 57.

165. Korzybski, *supra* note 128 at 36-37 [emphasis in original]. While *similarity-of-structure* is preferable to a 'correspondence' theory, another layer of sophistication concerns whether resultant 'similarity relations' require some form of 'objectivity' or are better seen as dynamic activities, best captured by rival 'knowledge-as-function' models. See e.g. Mary S Morgan & Margaret Morrison, eds, *Models as Mediators: Perspectives on Natural and Social Science* (Cambridge University Press, 1999), which prompted a rethinking of scientific models and theories by analysing their role and function as distinct from traditional syntactic and semantic views. This (and related) scholarship is not meant to be overlooked by focusing on Korzybski's models and approach.

166. Korzybski, *supra* note 128 at 37 [emphasis added].

167. *Ibid* [emphasis added].

168. See Legrand, *Negative Comparative Law*, *supra* note 2 at 222.

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2.B. Relearning Functionalism: Process-Relational Foundations of Rabel's Early Theory

Besides Legrand and Frankenberg's critiques, a recurrent complaint against functionalism has been that its pioneering architect, "father of comparative law," Ernst Rabel "never formulated [a] comprehensive and systematic methodology."[169] However, interpreting Rabel's original functionalist theory through the lens of process-relational philosophy helpfully addresses this concern. As apparent from his most comprehensive and definitive comparative law statements, it is highly plausible that Rabel contemplated a structural metaphysics informed by something precisely like process-relational epistemology.

(i) Organism-as-a-Whole-in-an-Environment: The Multi-Ordinality of Legal Phenomena

Another pillar of process-relational philosophy germane to the modern-day comparatist is its repudiation of 'elementalism', or the mistaken tendency to split apart at Label Levels what cannot be split at the Event or Object Levels. Instead, knowledge claims are treated from an *organism-as-a-whole-in-an-environment* perspective, accepting the permanent connection and interdependence of 'natural' and 'social' facts, which more aptly "parallels the Einstein-Minkowski space-time integration in physics."[170] In short, we don't do *anything* out of context.

Even to the casual observer, it might appear sensible that the environment plays a critical role in process-relational thought. After all, "the term 'abstracting' implies 'abstracting from *something*' and so involves the environment [by] *implication*."[171] But the importance of 'environment' for process-relational philosophy runs much deeper. As with our enigmatic elementary school pencil, another difficulty with obtaining information is that, on top of perpetual flux, scientific objects are "inextricably *connected* with everything else,"[172] such that their context cannot be discounted. There is no simple 'individual'. The 'thing' *is* its environment. Contrary to conventional thinking, "it's not simply the same thing being *more or less* affected by a different environment."[173] Political theorist Gad

169. Jaakko Husa, "Comparative Law, Legal Linguistics and Methodology of Legal Doctrine" in Mark Van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) 209 at 212 [footnote omitted], 214.

170. Korzybski, *supra* note 124 at xxxii. Despite Minkowski's pioneering work on spacetime integration, it is Einstein's theory of general relativity that better supports the claim that nothing happens outside of context, as it was his approach alone (not Minkowski's) that rejected considering 'space' or 'time' as anything other than coincidences of experimental measurement activities and preparations. I am indebted to my anonymous reviewer for this welcome explanatory nuance. For an excellent primer on this point, see David R Finkelstein, *Quantum Relativity: A Synthesis of the Ideas of Einstein and Heisenberg* (Springer, 1996) at ch 1.

171. Korzybski, *supra* note 128 at 175 [emphasis added].

172. *Ibid* at 180 [emphasis added].

173. Gad Horowitz & Shannon Bell, eds, *The Book of Radical General Semantics* (Pencraft International, 2016) at 62 [emphasis added].

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Horowitz helped to clarify this elusive notion using the instructive example of a 'malfunctioning' car radio, explaining:

> The radio in your car CR1a (on an open highway) ≠ CR1b (going under a bridge—radio cuts out) ≠ CR1c (going under a high transmission wire—radio squeals). . . . We Aristotelians would like to think that there is a CR in-itself which remains the same while *functioning* differently in different circumstances. But *everything is function*! There is no 'it' apart from functions, or actions, which *'has'* different functions in different contexts. There never was a CAR RADIO *in-itself* apart from any and all contexts which then entered into different contexts. The thought of the car radio 'itself' is actually about the radio-in-a-context-where-it-is-working-as-it-'should'.[174]

Illustrating this point at sub-atomic levels of abstraction, Whitehead instructed almost a century earlier:

> A scientific object such as a definite electron is a systematic correlation of the characters of all events throughout all nature. It is an *aspect* of the *systematic character* of nature. The electron is not merely where its charge is. The charge is the quantitative character of certain events due to the ingression of the electron into nature. The electron is its *whole field of force*.[175]

Process-relational theorists thus find it uncontroversial that "an electron *within* a living body is different from an electron *outside* it."[176] The primary consequence for our already beleaguered legal comparatist is that *context* must be brought directly and comprehensively into our definitions of 'individual' scientific objects.[177] Since we cannot use the 'is' of identity without confusing orders of abstraction, we must represent this environmental complexity by returning to process-relational philosophy's central insight into human knowledge acquisition. Specifically, we must formulate *multi*-ordinal relationships and *structural* characteristics—an approach at least broadly consistent with Rabel's original functionalist model.

(ii) Ernst Rabel's Radical Contextualisation of Domestic and Foreign Law

Rabel's contributions to functionalism are often underestimated by being categorised as more "deliberately pragmatic . . . than theoretical."[178] Despite his principal comparative law ideas becoming synonymous with functionalist theory, Jaakko Husa maintains that "Rabel never formulated any comprehensive and systematic methodology,"[179] an increasingly questionable assertion in view of the far-reaching epistemological scope and implications of process-relational thought.

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174. *Ibid* [first and fourth emphases in original, second and third emphases added], citing Chisholm, *supra* note 162.
175. Whitehead, *The Concept of Nature*, *supra* note 121 at 158-59 [emphasis added].
176. Whitehead, *Science and the Modern World*, *supra* note 121 at 79 [emphasis added].
177. See Kischel, *supra* note 35 at 173. Frankenberg notes that absent more detail, Kischel's proposed 'contextual approach' amounts to little more than "a theory about how to avoid mistakes." Frankenberg, *supra* note 35 at 1007.
178. Michaels, *supra* note 34 at 367.
179. Husa, *supra* note 169 at 214.

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A dedicated internationalist who envisioned a common core to all legal systems, Rabel's 'rough functionalism' anticipated that even private law rules "have special *functions* and *purposes* requiring a method of international scope."[180] As Örücü has observed, Rabel's deceptively simple research question was: "How is a special *social* or *legal* problem encountered both in society A and society B resolved by their respective (legal or other) systems?"[181] Offering an apparently simpler alternative to Zweigert and Kötz's prevailing functionalist model, Husa contends that Rabel provided "a flexible methodological rule that is easy to operate and remember," viz: [Rabel said] "Instead of concentrating on studying particular material and isolated provisions, emphasis should be on the comparison of those *specific solutions* that each state makes in 'situations' that are *practically identical*."[182]

Contrary to modern-day 'postmodern' interpretations, it would be incorrect to presume that Rabel's focus on 'specific solutions' unfairly 'represses' or oversimplifies the legal approaches endorsed in different jurisdictions. As the following excerpt reveals, process-relational conceptions of flux, interconnectedness, and *multi*-ordinal structure appear to have been implicit to Rabel's very idea of legal knowledge:

> The student of the problems of law must encompass the law of the *whole world*, past and present, and *everything that affects the law*, such as geography, climate and race, developments and events shaping the course of a country's history—war, revolution, colonisation, subjugation—religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes. *Ideas* of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; *legal institutions* once adopted may have logical consequences; and not least important is the striving for a political or legal ideal. *Everything* in the social, economic and legal fields *interacts*. The law of every developed people is in *constant motion*, and the *whole kaleidoscopic picture* is one which *no one has ever clearly seen*.[183]

The resemblances to process-relational philosophy are nothing short of striking. Imbued with integrative analysis and *multi*-ordinality characteristic of the sweeping scientific advances of his time, Rabel's language reflects process-relational thought more than Zweigert and Kötz (let alone Frankenberg and Legrand) might have realised. For instance, it is not the only sensible reading of the above quotation that "the comparatist must make every effort to learn and remember as much as he can about foreign civilizations," as Zweigert and Kötz instructed.[184] Rabel appears to be doing both much more … *and* much less. Consider the following passage:

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180. *Ibid* at 218 [emphasis added].
181. *Ibid* at 221 [emphasis added], citing Esin Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Springer, 2004) at 25.
182. Husa, *supra* note 169 at 216, 215-16 [emphasis added].
183. Zweigert & Kötz, *supra* note 1 at 37 [emphasis added], citing Rabel, *Collected Essays*, *supra* note 1 at 5.
184. Zweigert & Kötz, *supra* note 1 at 37.

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> In a word: We are not comparing rigid data and isolated paragraphs, but instead we are comparing the solutions that can be derived from legal life *in its entirety* in one and the other nation for the *same vital issues* . . . . By putting the *function* of legal institutions *first*, this *comprehensive research approach* serves to explain the given association with legal history.[185]

Rather than being understood as endorsing 'unfocused observation'—which philosopher of science Carl Hempel rightly dismissed as an invalid principle of scientific enquiry[186]—Rabel's self-described 'comprehensive research approach' would appear to be situating 'law' in its broadest possible *contexts*. Consistent with Twining's plea for constructing "total pictures," this radical contextualisation necessarily includes *all* of law's functions. Since "everything is function!" and a 'thing' exists only "as the confluence of all its relevant environing happenings,"[187] the functionalist method arguably cannot be faithfully (let alone charitably) interpreted independent of process-relational principles. Whether intentionally or not, Rabel can accordingly be construed as revealing functionalism's 'native' structural metaphysics and scientific ideals.

For whatever else one thinks of its being "insensitive to details" and its "technocratic" style,[188] Rabel's innovative method conformed commendably to evolving standards of scientific integrity. As Korzybski acknowledged at the peak of the twentieth-century revolution in theoretical physics, "[t]he new . . . standards of science really should be, '*state your undefined terms*'. In other words, 'lay on the table your metaphysics, your assumed structure, and then only proceed to define your terms in terms of these *undefined terms*'."[189] As for 'undefined terms', they are unavoidable, in that "*all* human statements . . . involve a structural metaphysics."[190] Rather than obscure their origins and nature, Rabel therefore can be read as endorsing a *process-relational* structural metaphysics, "[i]n this way . . . not blind[ing] the reader or student."[191]

A further benefit of attributing process-relational premises to Rabel's original functionalist model is that it obligingly situates his scholarly contributions within their wider academic field, where "[w]e invite criticism, elaboration, verification, evaluation., and so accelerate progress and make it easier for others to work out issues."[192] From this perspective, Rabel can be understood as formulating—as perhaps never before—law's *structurally* 'indisciplined' complexities,[193] an epistemic shift with important repercussions for functionalist theory and methods. Countering Frankenberg's accusation that functionalism fails to consider the "social, political, economic and *cultural* context of law,"[194] by radically

185. Rabel, *Collected Essays*, *supra* note 1 at 187 [emphasis added].
186. See Hempel, *supra* note 147 at 12-13.
187. Horowitz & Bell, *supra* note 173 at 62.
188. Michaels, *supra* note 34 at 379.
189. Korzybski, *supra* note 128 at 66 [emphasis in original].
190. *Ibid* at 65 [emphasis in original].
191. *Ibid*.
192. *Ibid*.
193. See generally Legrand, *Negative Comparative Law*, *supra* note 2 at ch 7.
194. Frankenberg, *Comparative Law as Critique*, *supra* note 2 at 54 [emphasis added].

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contextualising domestic and foreign laws, Rabel's early model evidenced remarkable epistemological sophistication, particularly when read in light of process-relational emphases on adhering to the 'natural' order of abstraction oriented to empirical phenomena. Interpreted in this manner, functionalism undergoes an unexpected forensic turn—particularly in light of Legrand and Frankenberg's exclusively 'positivist' interpretations. Superseding perhaps even the scope and complexity of their own 'law as culture' approaches, Rabel resolved: "From these sources we *have* to grasp life, the *functions* of the legal structures. Because the law is . . . a *cultural phenomenon*, it *cannot* be thought of *independently* of its causes and effects."[195]

In sum, despite outward similarities to Legrand's own 'negative metaphysical' approach, our review of process-relational thought demonstrates that, rather than having failed to formulate a comprehensive and systematic methodology, Rabel's original model can be perhaps better understood as providing functionalism's earliest structural metaphysics, offering a more contextualised and nuanced representation of law and legal knowledge than either his supporters or critics have so far acknowledged.

3. Process-Relational Functionalism: A Foundational Frame for Legal Comparison

Building on our introduction to process-relational thought, Part 3 demonstrates its theoretical relevance and exegetical power by examining its importance for reconceptualising 'difference' and 'similarity'—two concepts central to functionalism and its postmodern critiques.[196] Expanding on the synergies between Rabel's early functionalist model and process-relational principles, this section demonstrates how functionalism realises its comparative law objectives by optimising its two distinctive epistemic pathways and orientations: (1) at lower levels of abstraction, where wide-ranging, extensionally-oriented accounts of jurisdictional *differences* in their broader contexts can be developed; and (2) at higher levels of abstraction, where intensionally-oriented *similarities* are constructed and where 'comparison' and human intelligence must be exercised. Besides confirming the *relational* nature of comparative legal knowledge, process-relational principles expose the shortcomings of postmodern prescriptions for comparative law analysis, underscoring the need to advance beyond theoretically unending description-based techniques of 'tracing' and 'thick description', to more

195. Rabel, *Collected Essays*, *supra* note 1 at 4 [emphasis added].

196. Note that assessing 'difference' and 'similarity' epistemologically in no way negates their importance for hypothesis testing and establishing causality. See Ran Hirschl, "Methodology and Research Design" in David S Law, ed, *Constitutionalism in Context* (Cambridge University Press, 2022) 41 at 45-46; Gerhard Dannemann, "Comparative Law: Study of Similarities or Differences?" in Reimann & Zimmermann, *supra* note 34, 390 at 403-05.

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revealing structural knowledge claims comprised of shared institutional and discursive relationships and networks.

3.A. Differentiation and the Necessity of Abstraction

As confirmed in Parts 1 and 2, conceptions of 'difference' and 'similarity' are fundamental to understanding the functionalist method. Insisting that "difference is necessarily *there*" and "that it is ineliminably *present*, no matter how much any comparatist-at-law may wish to disregard it,"[197] the primary postmodern accusation against functionalism involves its apparent disdain for—or 'scandalising' of—*difference*. According to Legrand, the functionalist method "*institutionaliz*[*es*] . . . sameness and *ensure*[*s*] the disqualification of difference."[198] This programmed 'indifference to difference' is thought fatal to the comparative enterprise because "[w]ithout the *differend*, no thinking is possible."[199] But how credible is this depiction of 'difference' and 'similarity' without appeal to an explicit structural metaphysics? As argued below, three process-relational lessons expose these epistemic depictions as far too simplistic. By failing to distinguish the correct order and relationships between levels of abstraction, functionalism's leading detractors have arguably not only mistaken its core concepts of 'difference' and 'similarity', but have misread their implications for the nature and viability of comparative knowledge claims more generally.

(i) Lower-Order Abstractions: Perception as 'News of Difference'

The first epistemic lesson from a process-relational standpoint is that there is no need for a functionalist to deny that 'difference is necessarily there' or that it is 'ineliminably present'. 'Difference'—much like 'comparison'—not only cannot be avoided, but has been aptly prized as a scientist's "stock in trade."[200] In fact, Korzybski's Structural Differential establishes that a proper understanding of 'difference' encompasses three discrete dimensions.

The first involves 'vertical stratification' *between* levels of abstraction, which is shown visually by advancing from the Event Level, to the Object Level, to the Label Levels—eventually reaching our highest levels of abstraction containing our 'as if' formulations or 'best guess' maps.[201] Importantly, each level of abstraction represents a *transformation*, where component parts of the world are changed into different orders of existence and qualitative experiences. The map is not the territory. The word is not the thing. As the English linguist

197. Legrand, "Understanding Understanding", *supra* note 2 at 107 [emphasis added].
198. Legrand, "The same and the different", *supra* note 2 at 249 [emphasis added].
199. Legrand, "Understanding Understanding", *supra* note 2 at 164 [emphasis added].
200. James Craig, "Similarity and Semantics" (1996-97) 53:4 ETC: Rev General Semantics 413 at 414, quoting Wendell Johnson, *People in Quandaries: The Semantics of Personal Adjustment* (Harper & Row, 1946) at 38.
201. See Gregory Sawin, "The Structural Differential Diagram—Part IV Korzybski's Elaboration" (2003-04) 60:3 ETC: Rev General Semantics 304 at 306-08.

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and cyberneticist Gregory Bateson noted of the outermost ontological limits of this differentiation: "The territory never gets in at all. The territory is Ding an sich and you can't do anything with it."[202] In terms of the epistemological raw materials constituting our 'Legrandian yields' (so to speak), process-relational science confirms that we are left in the end with only our unique amalgams of non-verbal lower-order abstractions, and higher-order abstractions or 'maps'.

The second dimension of difference involves 'horizontal stratification' between similar 'objects', which stresses that on the non-verbal level of abstraction we deal only with *absolute individuals*—be they 'objects', situations, etc.[203] For instance, we know the Event Level to be a sub-atomic realm of unending flux, interconnectedness, and *multi*-ordinal relations.[204] Difference is the order of the day. This realm of difference and individuality is easily verified at the Object Level, where "[c]ommon experience and scientific investigations (more refined experience) show us that the world around us is made up of absolute individuals, each different and unique, although interconnected."[205] Recalling that each person abstracts a different and limited amalgamation of energies of 'reality', this second dimension of difference reminds us that "one person's perception, description, inference, conclusion, or belief is *not* identical to that of any other person."[206] In effect, your bite of the apple is never the same as mine (even if we take bites from 'the same' apple).

The third dimension of difference introduces the often-discounted factor of 'change over time', which involves a vital gloss on horizontal stratification whereby our uniquely abstracted experiences inexorably give rise to different perceptions and evaluations. While not explicitly signified on the two-dimensional Structural Differential, Korzybski emphasised cultivating an enhanced awareness of *time-related* differences, insisting that "[i]n a world of processes and non-identity it follows that no individual, 'object', event, etc., can be the 'same' from one moment to the next"[207]—recall Cratylus' maxim that we cannot step into the same river *once*. This 'time factor' must henceforth be managed carefully, as our partial experiences of 'reality' often require revisions to our descriptions and theories in light of new observations or data. Indeed, while scientifically-oriented, flexible thinkers are aware that their 'knowledge' may become obsolete and inaccurate over time—ideally by bearing in mind all *three* dimensions of 'difference'—close-minded, rigid thinkers tend to dogmatically cling to outdated and inaccurate formulations, unaware that their 'facts' and 'maps' are only imperfect abstractions from a fluctuating and densely interconnected 'reality'.

The epistemic upshot of these insights is that, contrary to Frankenberg and Legrand's charges of 'scandalising' and 'disregarding' difference, in a world

202. Bateson, *supra* note 146 at 96.
203. See Korzybski, *supra* note 128 at 120.
204. See Korzybski, *supra* note 124 at 161-70.
205. Korzybski, *supra* note 128 at 120.
206. Sawin, *supra* note 201 at 311 [emphasis added].
207. Korzybski, *supra* note 124 at lxiii.

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where *all* sensory experience is "'*news of a difference*,'"[208] and, where difference is structurally *more* basic than 'similarity', the evidential burden for justifying their epistemic reproaches of functionalism would seem to have become considerably more difficult to discharge.

(ii) Higher-Order Abstractions: 'Similarity' as 'Differences That Make no Difference'

Things get even trickier for functionalism's critics when we consider the relatively neglected idea of 'similarity'. The second epistemological insight from a process-relational standpoint is that properly differentiating between levels of abstraction requires accepting the foundational epistemic importance not of 'sameness' or 'similarity', but of *difference*. Once we understand that 'sameness' does *not* occur in the natural world, a 'similarity' is, in effect, best understood as a difference that does *not* make a difference.

Compared to Legrand and Frankenberg's more rudimentary epistemological models, process-relational philosophy helps to expose functionalism's 'inner epistemic workings' by detailing how 'similarity' and 'comparison' happen—including their necessarily close connections to 'difference'. As against lower-order abstractions and descriptive (i.e., Label) level abstractions representing absolute differences and interrelatedness, higher-order abstractions "are of a distinctly *different character*."[209] Specifically, compared to the interminable flux and ephemerality of Event and Object Level phenomena, higher-order abstractions such as 'describing' and 'theorising' are relatively "static, 'permanent', and cannot be entirely eliminated from any one [person]."[210] Though impracticable as a matter of fact, it is only 'in principle' that different objects or events are 'similar' or, much less convincingly, 'the same'. As with formulating the *praesumptio similitudinis* and completing functionalism's most abstract stage of 'system-building', 'similarity' is accordingly constructed only at higher, inferential levels of abstraction, a point illustrated by the following passage:

> It is "in principle" that different things are the same. This is to say, it is on relatively high levels of abstraction, "in general," "on the average," "for practical purposes," "in main essentials," with regard to certain more or less important respects (not in *all* respects) that two different things may be evaluated, spoken of, or dealt with as though they were identical.[211]

208. Bateson, *supra* note 146 at 95 [emphasis added].
209. Korzybski, *supra* note 128 at 148 [emphasis added].
210. *Ibid*. It should also be noted that recognising the *relative* 'permanence' or 'staticity' of higher-order abstractions is not meant to deny that knowledge *itself* is a process. Rescher underscores that "[k]nowledge is not a thing, let alone a commodity of a fixed and stable make-up; it is irremediably processual in nature, affected as deeply by the fluid nature of reality as anything else." Rescher, *Process Metaphysics*, *supra* note 122 at 134. See also Penn, "Pure Process Realism", *supra* note 122 at 53.
211. Johnson, *supra* note 200 at 179 [emphasis in original].

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Of fundamental importance to our understanding of legal comparison, 'similarity' then is a function of abstract thinking, occurring by *disregarding* difference as one progresses to ever higher levels of abstraction. Consequently, similarity "is *nothing metaphysical*, nor is it a property that is 'found in' or 'inherent to' objects themselves."[212] In a world of perpetual change and interconnectedness, any 'similarity' is in fact comprised of "differences that don't make any difference."[213] As an individually 'manufactured' article, process-relational thought shows that "[s]imilarities appear *only* as a result of the action of our nervous system, which does *not* register absolute differences."[214] Critical for evaluating accusations of functionalism's 'excessive conceptualisation' and methodological bent for 'surrendering to abstraction', any proper epistemic assessment must proceed from a keen awareness that "[s]imilarities are read *into nature* by our nervous system, and so are structurally *less fundamental*" than our antecedent, non-verbal experiences of difference.[215] In this respect, process-relational principles appear to add additional epistemic support to even classic functionalist concepts and protocols as established by Zweigert and Kötz.

Moreover, rather than inducing "metaphysical shivers about such extreme individuality," process-relational theorists openly acknowledge that not only does "our human economy … *need* both similarities and differences," but the process of distinguishing between them is essential for exercising human intelligence.[216] Emphasising the close *structural* connections between abstraction, similarity, and effective evaluation, Korzybski advised:

> [W]e start structurally *closer to nature* with un-speakable levels, and make *differences* fundamental, similarities appearing only at a later stage (order) *as a result of higher abstractions*. In simple words, we obtain similarities by disregarding differences, by a process of abstracting. In a world of only absolute differences, without similarities, recognition, and, therefore, 'intelligence', would be impossible.[217]

Challenging any Aristotelian metaphysic of 'sameness' implicit in postmodern functionalist critiques, this *difference*-based conception of 'similarity' can accordingly be seen as playing a critical—if not entirely misrepresented—role in comparative law scholarship.

3.B. Becoming 'Similarity Engineers': Beyond 'Tracing' and 'Thick/Thin' Accounts

This lack of sensitivity to process-relational epistemology is also found in leading postmodern responses to functionalism's presumed epistemic shortcomings, which require that we aspire to become not only 'difference engineers', as

212. Craig, *supra* note 200 at 416 [emphasis added].
213. Johnson, *supra* note 200 at 38 [emphasis omitted].
214. Korzybski, *supra* note 128 at 73 [emphasis added].
215. *Ibid* [first emphasis in original, second emphasis added].
216. *Ibid* at 72 [emphasis added].
217. *Ibid* [emphasis in original].

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Legrand sensibly proposed,[218] but, perhaps more importantly, that we endeavour to become consummate '*similarity* engineers' as well. Besides integrating our reworked conceptions of 'difference' and 'similarity' into the functionalist method, becoming a 'similarity engineer' requires, above all, abiding by the distinct processual insight into the *relational* nature and prospects of comparative legal knowledge.

(i) Recognition, Relations, and 'Structural Knowledge'

A third epistemological insight from process-relational philosophy is that this updated view of 'similarity' contributes to all legitimate knowledge claims—whether in comparative law, or elsewhere. Despite their outward focus on the concept of 'difference', both Legrand and Frankenberg have not only overlooked its close affinity with Rabel's original functionalist model, but would appear to have linked untenable epistemological conceptions of 'similarity' and 'difference' with the comparative process itself—in the case of Legrand, resulting in an unnecessary rejection of the possibility of comparative knowledge that is fully explicable only in light of process-relational thought.

The concept of 'abstraction' once more provides our pedagogical base. Besides selectively 'filtering out' significant amounts of information received through our senses—which, we will recall, render only *incomplete* representations of the world—as fully functioning human beings "we also 'compress' information, or handle it more efficiently, by making use of similarity."[219] Strictly speaking, without abstracting in higher orders, we would find ourselves trapped in a lower-order realm of conscious mental life described by the process-relational psychologist William James as "one great blooming, buzzing confusion."[220] That inferential thinking and human knowledge is possible at all is ultimately attributable to our unique ability as human beings to transcend this experiential chaos through the theoretically boundless process of 'higher-order' abstracting.[221]

Whitehead has usefully termed this vital compression factor '*recognition*', distinguishing between 'sense-recognition'—an experientially-based power of perception, and 'recognition' (more broadly)—a more abstract capability "reflected into the intellect as *comparison*."[222] Emphasising that even "[i]n perception we recognise," he explained that at its core "[r]ecognition is … merely *sense-awareness* in its capacity of positing before us factors in nature *which do not pass*."[223] Highlighting the close structural links between recognition and abstraction, Whitehead observed:

218. See Legrand, *Negative Critique*, *supra* note 2 at 156; Legrand, "The same and the different", *supra* note 2 at 288.
219. Craig, *supra* note 200 at 415.
220. William James, *The Principles of Psychology Vol I* (Henry Holt & Co, 1890) at 488.
221. See Korzybski, *supra* note 128 at 126; Craig, *supra* note 200 at 413.
222. Whitehead, *The Concept of Nature*, *supra* note 121 at 125 [emphasis added].
223. *Ibid* at 124-25 [emphasis added].

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> Recognition and abstraction essentially involve each other. Each of them exhibits an *entity for knowledge* which is less than the concrete fact, but is a real factor in that fact. . . . We cannot abstract without recognition, and we cannot recognise without abstraction. Perception involves apprehension of the event and recognition of the factors of its character.[224]

Of further importance to unlocking functionalism's 'inner epistemic workings', Whitehead discerned that 'recognition' occurs much differently at higher levels of abstraction. As "[i]t is impossible to recognise an event," our recognition of 'objects' must provide the epistemological *foundation* for inferential reasoning. But compared with 'sense-recognition'—which arises unconsciously—Whitehead postulated that "[o]n the intellectual side of the mind's experience there are *comparisons* of things recognised and consequent judgments of sameness or diversity."[225] Consistent with process-relational notions of *similarity-of-structure* and the fully structural content of knowledge, Whitehead further specified that, along with 'objects' themselves, "[w]hat are compared are the . . . *relations* of objects situated in events."[226] Confirming their necessity for science and human knowledge, Korzybski professed of these essential knowledge-making relations: "Without some higher abstractions we *cannot* be human at all. No science could exist with absolute individuals and no relations."[227]

At last, in contrast to Legrand's assurances that 'without the *differend* there is no thinking', from a process-relational perspective—in a world typified by perpetual change and absolute difference—it is more epistemically accurate to underscore the opposite. That is to say, there can be no 'thinking' without *similarity*—another unexpected forensic turn (along with our revitalisation of Rabel's original functionalist model), prompted by our process-relational 'rethink' of its underlying structural metaphysics and defining concepts.

(ii) Implications for Functionalism and its Postmodern Critiques

Besides their indispensability for uncovering functionalism's true epistemological nature, these process-relational insights present the following epistemic complications for Frankenberg and Legrand's respective postmodern critiques.

First, both theorists would appear to miss the mark when they criticise functionalism for inexorably 'surrendering to abstraction' and cultivating a wholesale 'disdain for difference'. Contrary to the Aristotelian substance-metaphysics implicit in their 'positivist' readings of the functionalist method[228]—in a world of uninterrupted change and interconnectedness—the 'natural' order of abstraction for human evaluation (including legal comparison, for it remains unclear why that should be necessarily different) is *not* based on 'similarity' (much less

224. *Ibid* at 189 [emphasis added].
225. *Ibid* at 143 [emphasis added].
226. *Ibid* at 125 [emphasis added].
227. Korzybski, *supra* note 128 at 126 [emphasis added].
228. See Legrand, *Negative Critique*, *supra* note 2 at 181.

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'sameness'), but on *difference*. Even if we take Legrand and Frankenberg at their word, there is only so much a legal comparatist *could* do to misrepresent such a dynamic environment using 'functionalist' methods.[229] Moreover, both theorists overlook any affinity between process-relational science and Rabel's original functionalist model, which effectively overturns our understanding of 'difference' and 'similarity' and (quite possibly) how functionalism was intended to work from inception.

Process-relational theorists like Whitehead have effectively shown that an integral part of recognising 'objects' situated within events is not only accepting their extreme individuality, but their *embeddedness* in complex relationships and causal networks—that is to say, accepting their 'functions', an observation of vital importance to understanding the nature and viability of comparative legal knowledge.[230] As our process-relational review of Rabel's model revealed, any credible understanding of 'the law' requires situating legal phenomena in their broader functional context(s). Stressing the *interactions* between the "social, economic, and legal fields," recall that Rabel listed as potential legal stimuli almost every conceivable institutional and discursive factor.[231] Nothing can be understood apart from its context—including legal phenomena, it would seem.

When interpreted in light of process-relational thought, Rabel's system demands a radical epistemological reorientation from its postmodern construal, reversing its polarities from an intensionally-oriented fixation on 'concepts and categories'—a structural misunderstanding endorsed by *both* Frankenberg and Legrand—to an extensionally-oriented, composite study of the law's 'functions', or its embeddedness in its various institutional and discursive *contexts*. As evidenced by his insistence upon functionalists "comparing the solutions that can be derived from legal life *in its entirety*" and to putting "the *function* of legal institutions *first*,"[232] Rabel's 'comprehensive research approach' requires legal comparatists to remain true to the 'natural' (i.e., *empirically*-oriented) order of abstraction characterising process-relational thought more generally.[233] In a world where all perception is 'news of difference', and where 'law' has been inextricably connected to its ever-changing contexts, we now have good reasons to doubt accusations of functionalist scholars mindlessly 'reducing' concrete differences to abstract commonalities.

Second, Frankenberg and Legrand's epistemic critiques are also undermined by process-relational conceptions of 'similarity'. Not only have they arguably

229. Kischel argues that functionalism is ill-suited "to providing general instructions for 'correct' comparative law in the manner of a recipe." Kischel, *supra* note 35 at 174. Dannemann also reports that not only do decisions whether to focus on 'difference' or 'similarity' depend on one's research purpose and stage of analysis, but—contrary to postmodern predictions—their "comparative enquiries are more concerned with *difference* than with similarity." Dannemann, *supra* note 196 at 418 [emphasis added].

230. See Whitehead, *The Concept of Nature*, *supra* note 121 at 125, 143, 189. See also Legrand, *Negative Critique*, *supra* note 2 at 129.

231. Zweigert & Kötz, *supra* note 1 at 36, citing Rabel, *Collected Essays*, *supra* note 1 at 5.

232. Rabel, *Collected Essays*, *supra* note 1 at 187 [emphasis added].

233. See Korzybski, *supra* note 124 at 169ff.

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mistaken functionalism's understanding and use of 'difference', but we now have powerful reasons to question their characterisation of the *praesumptio similitudinis* and functionalism's handling of 'concepts and categories' more generally. Given that 'similarity' is essentially a 'difference that does not make a difference'—and that recognition and comparison are impossible without the necessary and unremitting process of human abstraction—it is difficult to see how their epistemic charges against 'functionalism' can stand.

To take the clearest of examples: Given the importance of perpetual change to process-relational thought, Legrand's statements that the functionalist is "*bound* to reach one conclusion *only*," expressing a "truth-in-the-law [that] exists irrespective of the comparatist," must be rejected.[234] Using the functionalist model to identify relevant 'similarities' between different doctrinal approaches and their institutional and discursive contexts in no way dictates 'one conclusion' or 'one truth'. As process-relational epistemology shows, not only will different researchers likely not achieve 'the same' results—either within or across jurisdictional boundaries—they *cannot* do so. The precise results of functionalist analyses will be affected by each comparatist's independently abstracted energies of 'reality', which inevitably generate *different* perceptions, descriptions, inferences, conclusions, and beliefs—an understanding in the end fundamentally at odds with Legrand's view of functionalism as a 'vast equivalency-producing' machine. Quite aside from whether the functionalist method might be misused as suggested, there is no reason to presuppose that failures to distinguish between orders (and directions) of abstraction must *necessarily* happen. To the contrary, we know that for human evaluation to occur at all, we comparatists *must* engage in 'higher-order' abstracting. The real point of concern is determining when and how best to abstract in higher orders, and to what effect(s)—*not* whether to do so *at all*. A functionalist—like any other legal comparatist—ultimately has little choice in this matter.

Finally, building on our examination of process-relational thought's impact on restructuring our understanding of 'difference' and 'similarity', we can now proffer the following ideas regarding how and when similarities are best introduced in functionalist analysis. Against our revised epistemological background, which identifies structure and *multi*-ordinal relations as the only content of genuine knowledge claims, it would seem that functionalists ideally construct 'similarity' at a suitable level of *mid*-level discourse—one that is neither too close to 'extreme individuality' nor so abstract as to obscure jurisdictionally-relevant institutional and structural *relations*. One might say that the appropriate threshold would be a level of abstraction at which common institutional and discursive *networks* reveal themselves to be the most plausible collective 'function' or 'real live problem' underlying each jurisdiction's doctrinal differences. As Bruno Latour observed of quality-driven social science scholarship, "a good account [i]s one that *traces* a *network*."[235] Working ably within these epistemic constraints requires

234. Legrand, "Understanding Understanding", *supra* note 2 at 122 [emphasis added].
235. Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2005) at 128 [emphasis in original].

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understanding their subtleties, which—as we have seen—involves mastering process-relational philosophy's intricate epistemological dynamics.

Conclusion

Which brings us full circle. While modern-day jurists like Twining have long suspected that functionalism has outlived its stock formulations, the way forward has not been particularly clear. Advocating a 'radical rethink' of its theory and methods, Twining had in mind comprehensive adjustments connected with a growing awareness that comparatists necessarily engage in a profound epistemological process. But the answer may have been closer than anticipated—lying dormant, in effect, in functionalism's earliest formulations. When informed by process-relational thought, not only does the functionalist method become clearer, but it also provides a more reliable account of its continued use and significance. Rooted empirically in differing domestic approaches to shared regulatory goals, the challenge for legal comparativists is not one of imposing specific 'solutions' on other nations but, rather, identifying the *relational networks* that represent the governing dynamics to common socio-political problems. As no two comparators are 'the same'—institutionally or otherwise—strategic interventions necessary to attain regulatory objectives in any jurisdiction involve subtle adjustments reflecting distinctive constitutional structures and cultural norms. From a process-relational perspective, there is little to no point in forcing legal 'harmonisation'. There is even less value pursuing 'universalism'—both being structurally inconsistent with process-relational notions of change, context, and interconnectedness. By stopping short of venerating any Rabellian kaleidoscopic moment as 'preeminent', 'correct', or 'the truth', it is the underlying context or *relational network* that is perhaps functionalism's most valuable knowledge outcome—a point overlooked by *both* its adherents and modern-day critics.

In the end, rather than simply heralding comparative law's "unending combination and interplay of differences and similarities,"[236] what makes the discipline so 'interesting' (and challenging) is that each project requires its researchers not only to investigate 'thickly' enough to set 'legal' problems in their wider socio-political or 'functional' contexts but, by deploying their creative instincts, to identify the most native structural network for reconceiving the at first obscurantist 'legal' differences. Functionalism is hence neither a 'vast equivalence-producing machine', nor a mechanistic formula for projecting 'sameness' upon an ever-changing world. Built on a 'negative metaphysical' model informed by process-relational principles, the functionalist method can expect and engender precisely the opposite results. What can be expected are not singular legal

236. Uwe Kischel, "Critical Legal Studies, Postmodernism and the Contextual Method in Comparative Law—A Reply to *Günter Frankenberg*" (2016) 76 Heidelberg J Intl L 1009 at 1016.

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'truths' torn from their defining contexts and imposed on other jurisdictions, as mistakenly assumed. Rather, we can expect to find more abstract *relations* which—by mapping increasingly complex institutional networks and arrangements—permit extensive jurisdictional differences and cultural values to be optimally (re)calibrated in each nation's unique regulatory context. In short, a process-relational reconceptualisation of 'difference' and 'similarity' frees us from a false epistemological dichotomy of engaging either in unwarranted 'functionalist' identification and legal reductionism, or unending 'postmodern' description and 'tracing'—revealing a route to broader structural knowledge claims comprised of *multi*-ordinal networks of institutional and discursive relationships shared by a potentially unlimited array of global comparators.

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